Form No. 7

# San Francisco Law Library

No. 77021

**Presented by**

.....

EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down. or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

WILCOX & CO.

1290 No. 3679 1291

# United States

# Circuit Court of Appeals

## For the Ninth Circuit.

---

LOUIS CABIALE and ANDREW DONIZELLO,
Plaintffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

---

# Transcript of Record.

---

**Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.**

---

FILED
SEP 16 1921
F. D. MONCKTON,
CLERK.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.


Digitized by the Internet Archive
in 2011 with funding from
Public.Resource.Org and Law.Gov

http://www.archive.org/details/govuscourtsca9briefs1291x

No. 3679

# United States

# Circuit Court of Appeals

## For the Ninth Circuit.

LOUIS CABIALE and ANDREW DONIZELLO,
Plaintffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

# Transcript of Record.

**Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.**

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]


| | Page |
|---|---|
| Affidavit of S. V. Thomas Attached to Motion for New Trial | 110 |
| Assignment of Errors | 120 |
| Bill of Exceptions | 28 |
| Certificate of Clerk U. S. District Court to Transcript of Record | 132 |
| Citation on Writ of Error | 136 |
| Information | 2 |
| Judgment | 115 |
| Judgment on Verdict of Guilty | 117 |
| Minutes of Court—July 31, 1920—Pleas | 22 |
| Minutes of Court—September 21, 1920—Trial | 23 |
| Minutes of Court—September 22, 1920—Trial (Continued) | 25 |
| Minutes of Court—October 2, 1920—Judgment | 115 |
| Minutes of Court—October 6, 1920—Order Allowing Writ of Error | 130 |
| Motion for New Trial | 108 |
| Motion in Arrest of Judgment | 114 |
| Names and Addresses of Attorneys of Record | 1 |
| Order Allowing Writ of Error | 131 |

Index. Page

Order Extending Time to and Including December 15, 1920, to File Record and Docket Cause..... 138
Order Extending Time to and Including February 1, 1921, to File Record and Docket Cause..... 139
Order Extending Time to and Including March 1, 1921, to File Record and Docket Cause.. 140
Order Extending Time to and Including April 1, 1921, to File Record and Docket Cause.. 142
Petition for Writ of Error..... 118
Pleas..... 22
Praecipe for Transcript on Writ of Error.... 1
Return to Writ of Error..... 135

TESTIMONY ON BEHALF OF THE GOVERNMENT:

DREW, H. C. (Recalled in Rebuttal).... 88
Cross-examination..... 89
DREW, HARRY Z..... 54
Cross-examination..... 55
ESTELLE, A. L..... 57
Cross-examination..... 58
HARDIE, A. M..... 59
JORDAN, WILLIAM J..... 51
Cross-examination..... 53
Recalled in Rebuttal..... 89
KUPSER, H. M..... 39
Cross-examination..... 42
LOVE, R. F..... 60
Cross-examination..... 61
Redirect Examination..... 62

Index. Page

TESTIMONY ON BEHALF OF THE GOVERNMENT—Continued:
POULTNEY, GEORGE.... .... .... .. 29
Cross-examination..... ..... ..... 31
Redirect Examination.... ..... .... 34
Recalled..... .... .... ..... 59
Recalled in Rebuttal..... 87
SHAEN, SAMUEL..... ..... ..... 45
Cross-examination..... .... ..... 47
Redirect Examination.... .... ..... 49
Recross-examination..... .... .... 49
SHURTLEFF, A. R..... ..... .... 35
Cross-examination.... ..... .... .. 37
Redirect Examination..... .... .... 39
Recalled..... ..... 63
SMITH, W. D..... 43
Cross-examination .. ..... 44
Recalled in Rebuttal..... 88
Cross-examination .. ..... 88

TESTIMONY ON BEHALF OF DEFENDANTS:
BATTAGLIA, GUIDO..... 84
Cross-examination .. ..... 85
BERTOLOTTI, G..... 82
CABIALE, LOUIS ..... 68
Cross-examination .. ..... 74
CESANA, ALBERTO..... 85
Cross-examination ..... 85
COPPOLA, FRANK ..... 76
Cross-examination ... ..... 76
DONIZELLO, ANDREW ..... 80

Index. Page

TESTIMONY ON BEHALF OF DEFENDANTS—Continued:
Cross-examination .. ..... 82
FORASIEPI, DANTE ..... 78
Cross-examination .. ..... 78
GABALIO, PETER ..... 79
Cross-examination .. ..... 79
PORCELLINI, ATTILIO ..... 83
Cross-examination ..... 84
RATTO, E. M..... 85
Cross-examination ..... 86
SMITH, W. D. (Recalled)..... 67
ZURICH, PETER ..... 77
Cross-examination ..... 77
Redirect Examination ..... 77
Recross-examination ..... 77
Trial ..... 23
Trial (Continued)..... 25
Verdict ..... 107
Writ of Error..... 133

**Names and Addresses of Attorneys of Record.**

For Defendants and Plaintiffs in Error:

CHAUNCEY F. TRAMUTOLO, Esq., San Francisco.

For Plaintiff and Defendant in Error:

U. S. ATTORNEY, San Francisco, Calif.

---

UNITED STATES OF AMERICA.

District Court of the United States, Northern District of California.

No. 8602.

CLERK'S OFFICE.

UNITED STATES OF AMERICA

vs.

LOUIS CABIALE et al.

**Praecipe for Transcript on Writ of Error.**

To the Clerk of Said Court:

Sir: Please prepare transcript on writ of error, and include the following papers and proceedings:

Information.

Minutes of July 31, September 21, 22, October 2, 6, 1920.

Verdict.

Motion for New Trial.

Motion in Arrest of Judgment.

Judgment.

Petition for Writ of Error.

Order Allowing Writ of Error.

Assignment of Errors.
Bill of Exceptions.
Original Writ of Error.
Original Citation on Writ of Error.
This Praecipe.

C. F. TRAMUTOLO,
Attorney for Defendants.

[Endorsed]: Filed Mar. 17, 1921. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [1*]

---

In the Southern Division of the District Court of the United States, Northern District of California, First Division.

No. 8602.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LOUIS CABIALE, ANDREW DONIZELLO, PIETRO GABALIO, G. BERTOLOTTI, PETER ZURICH, ATTILIO PARCELLINI, FRANK COLAI and DANTE FORASIEPI,
Defendants.

**Information.**

At the July term of said court, in the year of our Lord one thousand nine hundred and twenty.

BE IT REMEMBERED that Frank M. Silva,

---

*Page-number appearing at foot of page of original certified Transcript of Record.

United States Attorney for the Northern District of California, by and through Albert M. Hardie, Assistant United States Attorney, who for the United States in its behalf prosecutes in his own proper person, comes into court on this, the 29th day of July, 1920, and with leave of said Court first having been had and obtained, gives the Court to understand and be informed as follows, to wit: That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath, and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof;

NOW THEREFORE, your informant presents: THAT Louis Cabiale, Andrew Donizello, Pietro Gabalio, G. Bertolotti, Peter Zurich, Attillio Parcellini, Frank Colai and Dante Forasiepi, hereinafter [2] called the defendants heretofore, to wit, on the 22d day of July, 1920, at 1549 Stockton Street, in the city and county of San Francisco, in the Southern Division of the Northern District of California, after the date upon which the Eighteenth Amendment to the Constitution of the United States went into effect, did unlawfully, wilfully and knowingly, in violation of Section 21, Title II of the Act of October 28th, 1919, known as the National Prohibition Act, maintain a common nuisance in that they did unlawfully, wilfully and knowingly keep on the premises situated at said 1549 Stockton Street known as the Gianduja Hotel, Restaurant, Café and Bar certain intoxicating liquor, to wit, claret wine

containing one-half of one per cent or more of alcohol by volume, which said liquor was then and there fit for use for beverage purposes.

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided.

SECOND COUNT.

And affiant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof.

NOW THEREFORE, your informant presents, THAT Louis Cabiale, Andrew Donizello, Pietro Gabalio, G. Bertollotti, Peter Zurich, Attilio Parcellini, Frank Colai and Dante Forasiepi, hereinafter called the defendants heretofore, to wit, on the 22d day of July, at 1549 Stockton Street, in the County of San Francisco, in the Southern Division of the Northern District of California, then and there being, after the date upon which the 18th Amendment to the Constitution of the United States went into effect, unlawfully, [3] wilfully and knowingly, in violation of Section 3, Title II, of the Act of October 28, 1919, known as the National Prohibition Act, have in their possession certain intoxicating liquor, to wit, claret wine, containing one-half of one per cent or more of alcohol by volume,

which said liquor was then and there fit for use for beverage purposes.

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided.

THIRD COUNT.

And affiant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit, made under oath and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof.

NOW THEREFORE, your informant presents: THAT Louis Cabiale, Andrew Donizello, Pietro Gabalo, G. Bertollotti, Peter Zurich, Attilio Parcellini, Frank Colai and Dante Forasiepi hereinafter called the defendants heretofore to wit, on the 22d day of July, 1920 at 1549 Stockton Street in the city and county of San Francisco in the Southern Division of the Northern District of California, then and there being, after the date upon which the 18th Amendment to the Constitution of the United States went into effect, did then and there unlawfully, wilfully and knowingly in violation of Section 3, Title II of the Act of October 28, 1919, known as the National Prohibition Act, sell certain intoxicating liquor, to wit, claret wine, containing one-half of one per cent or more of alcohol by volume and then and there fit for use for beverage purposes. That the

sale of the said intoxicating liquor by the said defendants at [4] the time and place aforesaid was then and there prohibited and unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the "National Prohibition Act."

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided.

FOURTH COUNT.

And affiant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit, made under oath and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof.

NOW THEREFORE, your informant presents: THAT Louis Cabiale, Andrew Donizello, Pietro Gabalo, G. Bertollotti, Peter Zurich, Attilio Parcellini, Frank Colai and Dante Forasiepi hereinafter called the defendants heretofore to wit, on the 22d day of July, 1920 at 1549 Stockton Street in the city and county of San Francisco in the Southern Division of the Northern District of California, then and there being, after the date upon which the 18th Amendment to the Constitution of the United States went into effect, did then and there unlawfully, wilfully and knowingly in violation of Section 3, Title II of the Act of October 28, 1919, known as the Na-

tional Prohibition Act, sell certain intoxicating liquor, to wit, claret wine, containing one-half of one per cent or more of alcohol by volume and then and there fit for use for beverage purposes. That the sale of the said intoxicating liquor by the said defendants at the time and place aforesaid was then and there prohibited and [5] unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the "National Prohibition Act."

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided.

FIFTH COUNT.

And affiant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit, made under oath and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof.

NOW THEREFORE, your informant presents: THAT Louis Cabiale, Andrew Donizello, Pietro Gabalo, G. Bertollotti, Peter Zurich, Attilio Parcellini, Frank Colai and Dante Forasiepi hereinafter called the defendants heretofore to wit, on the 22d day of July, 1920, at 1549 Stockton Street in the city and county of San Francisco, in the Southern Division of the Northern District of California, then and there being, after the date upon which the 18th

Amendment to the Constitution of the United States went into effect, did then and there unlawfully, wilfully and knowingly in violation of Section 3, Title II of the Act of October 28th, 1919, known as the National Prohibition Act, sell certain intoxicating liquor, to wit, claret wine, containing one-half of one per cent or more of alcohol by volume and then and there fit for use for beverage purposes. That the sale of the said intoxicating liquor by the said defendants at the time and place aforesaid was then and there prohibited and unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to-wit, the "National Prohibition Act." [6]

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided.

SIXTH COUNT.

And affiant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit, made under oath and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof.

NOW THEREFORE, your informant presents: THAT Louis Cabiale, Andrew Donizello, Pietro Gabalo, G. Bertollotti, Peter Zurich, Attilio Parcellini, Frank Colai and Dante Forasiepi hereinafter called the defendants heretofore to wit, on the 22d

day of July, 1920, at 1549 Stockton Street in the city and county of San Francisco, in the Southern Division of the Northern District of California, then and there being, after the date upon which the 18th Amendment to the Constitution of the United States went into effect, did then and there unlawfully, wilfully and knowingly in violation of Section 3, Title II of the Act of October 28, 1919, known as the National Prohibition Act, sell certain intoxicating liquor, to wit, claret wine, containing one-half of one per cent or more of alcohol by volume and then and there fit for use for beverage purposes. That the sale of the said intoxicating liquor by the said defendants at the time and place aforesaid was then and there prohibited and unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the "National Prohibition Act."

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided. [7]

SEVENTH COUNT.

And affiant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit, made under oath, and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof,

NOW THEREFORE, your informant presents: Louis Cabiale, Andrew Donizello, Pietro Gabalo, G. Bertollotti, Peter Zurich, Attilio Parcellini, Frank Colai and Dante Forasiepi, hereinafter called the defendants, to wit, on the 23d day of July, 1920, at 1549 Stockton Street in the city and county of San Francisco, in the Southern Division of the Northern District of California, then and there being, after the date upon which the 18th Amendment to the Constitution of the United States went into effect, did then and there unlawfully, wilfully and knowingly maintain a common nuisance in that the said defendants did then and there at the said 1549 Stockton Street on the premises known as the Gianjuja Hotel, Restaurant, Café and Bar keep certain intoxicating liquor, to wit, claret wine, jackass brandy, vermouth and mareschini, containing one-half of one per cent or more of alcohol by volume and then and there fit for use for beverage purposes.

That the keeping of the said intoxicating liquor at the time and place aforesaid by the said defendants was then and there prohibited, unlawful and in violation of Section 21 of Title II of the Act of Congress of October 28, 1919, to wit, the "National Prohibition Act."

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided. [8]

EIGHTH COUNT.

And affiant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit, made under oath and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof.

NOW THEREFORE, your informant presents: THAT Louis Cabiale, Andrew Donnizzello, Pietro Gabalo, G. Bertollotti, Peter Zurich, Attilio Parcellini, Frank Colai and Dante Forasiepi, hereinafter called the defendants, to wit, on the 23d day of July, 1920, at 1549 Stockton Street in the city and county of San Francisco, in the Southern Division of the Northern District of California, then and there being, after the date upon which the 18th Amendment to the Constitution of the United States went into effect, did then and there unlawfully, wilfully and knowingly have in their possession certain intoxicating liquor, to wit, claret wine, jackass brandy, vermouth and mareschino containing one half of one per cent or more of alcohol by volume and then and there fit for use for beverage purposes.

That the possession of the said intoxicating liquor by the said defendants at the time and in the place aforesaid was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided. [9]

NINTH COUNT.

And affiant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit, made under oath and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof.

NOW, THEREFORE, your informant presents THAT Louis Cabiale, Andrew Donnizello, Pietro Gabalo, G. Bertollotti, Peter Zurich, Attilio Parcellini, Frank Colai and Dante Forasiepi, hereinafter called the defendants, to wit, on the 23d day of July, 1920, at 1549 Stockton Street in the city and county of San Francisco, in the Southern Division of the Northern District of California, then and there being, after the date upon which the 18th Amendment to the Constitution of the United States went into effect, did then and there unlawfully, wilfully and knowingly furnish to George Poultney and C. W. Herbert certain intoxicating liquor, to wit, claret wine, containing one-half of one per cent or more of alcohol by volume and then and there fit for use for beverage purposes.

That the furnishing of the said intoxicating liquor by the said defendants at the time and in the place aforesaid was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided. [10]

TENTH COUNT.

And affiant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit, made under oath and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof.

NOW, THEREFORE, your informant presents THAT Louis Cabiale, Andrew Donnizello, Pietro Gabalo, G. Bertollotti, Peter Zurich, Attilio Parcellini, Frank Colai and Dante Forasiepi, hereinafter called the defendants, to wit, on the 23d day of July, 1920, at 1549 Stockton Street in the city and county of San Francisco, in the Southern Division of the Northern District of California, then and there being, after the date upon which the 18th Amendment to the Constitution of the United States went into effect, did then and there unlawfully, wilfully and knowingly furnish to George Poultney and C. W. Herbert certain intoxicating liquor, to wit, cocktails containing one half of one per cent or more of alcohol by volume and then and there fit for use for beverage purposes.

That the furnishing of the said intoxicating liquor by the said defendants at the time and in the place aforesaid was then and there prohibited, unlawful

and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided. [11]

ELEVENTH COUNT.

And affiant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit, made under oath and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof.

NOW, THEREFORE, your informant presents THAT Louis Cabiale, Andrew Donnizello, Pietro Gabalo, G. Bertollotti, Peter Zurich, Attilio Parcellini, Frank Colai and Dante Forasiepi, hereinafter called the defendants, to wit, on the 23d day of July, 1920, at 1549 Stockton Street in the city and county of San Francisco, in the Southern Division of the Northern District of California, then and there being, after the date upon which the 18th Amendment to the Constitution of the United States went into effect, did then and there unlawfully, wilfully and knowingly sell certain intoxicating liquor, to wit, whiskey, containing one-half of one per cent or more of alcohol by volume and then and there fit for use for beverage purposes.

That the sale of the said intoxicating liquor by

the said defendants at the time and in the place aforesaid was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided.

FRANK M. SILVA,
United States Attorney,
ALBERT M. HARDIE,
Assistant United States Attorney,
Attorneys for Plaintiff. [12]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

George Poultney, being duly sworn, deposes and says: THAT Louis Cabiale, Andrew Donizello, Pietro Gabalio, G. Bertolotti, Peter Zurich, Attilio Parcellini, Frank Colai, Dante Forasiepi, on the 22d day of July, 1920, at San Francisco, in the county of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, did then and there possess certain intoxicating liquor, to wit, wine, containing one-half of one per cent or more of alcohol by volume, which said liquor was then and there fit for use for beverage purposes.

That the possession of the said intoxicating liquor by the said defendants was then and there prohibited, unlawful, and in violation of Section 3, Title

II, of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

And affiant aforesaid on his oath aforesaid, doth further depose and says: That Louis Cabiale, Andrew Donizello, Pietro Gabalio, G. Bertolatti, Peter Zurich, Attilio Parcellini, Frank Colai, Dante Forasiepi, on July 22, 1920, at San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, did then and there maintain a common nuisance in that the said defendants did keep on the premises at 1549 Stockton Street, known as Gianduja Café and Restaurant, intoxicating liquor, to wit, wine, containing one-half of one per cent or more of alcohol in volume, which was then and there fit for use for beverage purposes.

That the keeping of the said intoxicating liquor by the said defendants was then and there prohibited, unlawful, and in violation of Section 21, of Title II, of the Act of October 28, 1919, to wit, the National Prohibition Act. [13]

And affiant aforesaid on his oath aforesaid, doth further depose and say: That Louis Cabiale, Andrew Donizello, Pietro Gabalio, G. Bertolatti, Peter Zurich, Attilio Parcellini, Frank Colai, Dante Forasiepi, on July 2, 1920, at San Francisco, California, and within the jurisdiction of this Court, did then and there sell on the premises at 1549 Stockton St., known as the Gianduja Café and Restaurant, intoxicating liquor, to wit, claret wine, containing one-half of one per cent or more of alcohol by volume,

which said liquor was then and there fit for use for beverage purposes.

That the selling of the said intoxicating liquor by the said defendants was then and there prohibited, unlawful and in violation of Section 3, Title II, of the Act of October 28, 1919, to wit, the National Prohibition Act.

And affiant aforesaid on his oath aforesaid, doth further depose and say: That, Louis Cabiale, Andrew Donizello, Pietro Gabalo, G. Bertolotti, Peter Zurich, Attilio Parcellini, Frank Colai, Dante Forasiepi, on July 22, 1920, at San Francisco, California, and within the jurisdiction of this Court, did then and there sell on the premises at 1549 Stockton St., known as Gianduja Café and Restaurant, intoxicating liquor, to wit, claret wine, containing one-half of one per cent or more of alcohol by volume which was then and there fit for usė for beverage purposes.

And affiant aforesaid on his oath aforesaid, doth further depose and say: That Louis Cabiale, Andrew Donizello, Pietro Gabalio, G. Bertolotti, Peter Zurich, Attilio Parcellini, Frank Colai, Dante Forasiepi, on July 22, 1920, at San Francisco, California, and within the jurisdiction of this Court, did then and there sell on the premises at 1549 Stockton Street, known as Gianduja Café and Restaurant, intoxicating liquor, to wit, claret wine, containing one-half of one per cent or more of alcohol by volume, which was [14] then and there fit for use for beverage purposes.

That the sales of the said intoxicating liquor by

the said defendants was then and there prohibited, unlawful and in violation of Section 3 of Title II, of the Act of October 28, 1919, to wit, the National Prohibition Act.

And affiant aforesaid on his oath aforesaid, doth further depose and say: That Louis Cabiale, Andrew Donizello, Pietro Gabalio, G. Bertolotti, Peter Zurich, Attilio Parcellini, Frank Colai, Dante Forasiepi, on July 22, 1920, at San Francisco, California, and within the jurisdiction of this Court, did then and there sell on the premises at 1549 Stockton Street, known as the Gianduja Café and Restaurant, intoxicating liquor, to wit, claret wine, containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

And affiant aforesaid on his oath aforesaid, doth further depose and say: That Louis Cabiale, Andrew Donizello, Pietro Gabalio, G. Bertolotti, Peter Zurich, Attilio Parcellini, Frank Colai, and Dante Forasiepi, on July 2, 1920, at San Francisco, California, and within the jurisdiction of this Court, did then and there sell on the premises at 1549 Stockton Street, known as Gianduja Café and Restaurant, intoxicating liquor, to wit, claret wine, containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the sale of the said intoxicating liquor by the said defendants was then and there prohibited, unlawful and in violation of Section 3 of Title II

of the Act of October 28, 1919, to wit, the National Prohibition Act. [15]

And affiant aforesaid on his oath aforesaid, doth further depose and say: That Louis Cabiale, Andrew Donizello, Pietro Gabalio, G. Bertolotti, Peter Zurich, Attilio Parcellini, Frank Colai and Dante Forasiepi, on July 23, 1920, at San Francisco, California, and within the jurisdiction of this Court, did then and there maintain a common nuisance in that the said defendants did keep on the premises at 1549 Stockton Street, known as the Gianduja Café and Restaurant, intoxicating liquor, to wit, claret wine, vermouth and mareschini containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the keeping of the said intoxicating liquor by the said defendants was then and there prohibited, unlawful and in violation of Section 21 of Title II, of the Act of October 28, 1919, to wit, the National Prohibition Act.

And affiant aforesaid on his oath aforesaid, doth further depose and say: That Louis Cabiale, Andrew Donizello, Pietro Gabalio, G. Bertolotti, Peter Zurich, Attilio Parcellini, Frank Colai and Dante Forasiepi, on July 23, 1920, at San Francisco, California, and within the jurisdiction of this Court, did then and there possess intoxicating liquor, to wit, red wine, jackass brandy, vermouth and mareschino wine, containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the possession of the said intoxicating liquor by the said defendants was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of October 28, 1919, to wit, the National Prohibition Act. [16]

And affiant aforesaid doth further depose and say: That Louis Cabiale, Andrew Donizello, Pietro Gabalio, G. Bertolotti, Peter Zurich, Attilio Parcellini, Frank Colai and Dante Forasiepi, on July 23, 1920, at San Francisco, aforesaid did then and there furnish to the said affiant and C. W. Herbert certain intoxicating liquor, to wit, wine, containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

And affiant aforesaid on his oath aforesaid, doth further depose and say: Louis Cabiale, Andrew Donizello, Pietro Gabalio, G. Bertolotti, Peter Zurich, Attilio Parcellini, Frank Colai and Dante Forasiepi, on July 23, 1920, at San Francisco, did then and there sell on the premises at 1549 Stockton Street, intoxicating liquor, to wit, whiskey, containing one-half of one per cent or more of alcohol by volume, which was then and there fit for use for beverage purposes.

And affiant aforesaid on his oath aforesaid, doth further depose and say: That Louis Cabiale, Andrew Donizello, Pietro Gabalio, G. Bertolotti, Peter Zurich, Attilio Parcellini, Frank Colai and Dante Forasiepi, on July 23, 1920, at San Francisco, California, and within the jurisdiction of this Court, did then and there furnish to George Poultney and C. W. Herbert certain intoxicating liquor, to wit,

cocktails, containing one-half of one per cent or more of alcohol by volume, which said liquor was then and there fit for use for beverage purposes.

That the furnishing and selling of the said intoxicating liquor by the said defendants was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of [17] October 28, 1919, to wit, the National Prohibition Act.

GEORGE POULTNEY.

Subscribed and sworn to before me this 28th day of July, 1920.

[Seal] FRANCIS KRULL,
United States Commissioner Northern Dist. of California.

[Endorsed]: Filed July 29th, 1920. W. B. Maling, Clerk. By Lyle S. Morris, Deputy. [18]

---

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Saturday, the 31st day of July, in the year of our Lord one thousand nine hundred and twenty. Present: The Honorable WILLIAM H. SAWTELLE, Judge.

No. 8602.

UNITED STATES OF AMERICA

vs.

LOUIS CABIALE, ANDREW DONIZELLO, PIETRO GAVELLO, G. BERTOLOTTI, PETER ZURICH, ATTILIO PARCELLINI, FRANK COPPOLO and DANTE FORASIEPI

**Minutes of Court—July 31, 1920—Pleas.**

In this case the defendants were present with attorney, C. F. Tramutolo, Esq., and A. M. Hardie, Esq., Asst. U. S. Atty., was present on behalf of the United States. After hearing the respective attorneys, arraignment was waived, and pleas of "Not Guilty" as to each defendant was entered herein, and this case ordered continued to September 17, 1920, for trial, and that each of said defendants have until August 3, 1920, within which to give bonds for appearance herein. [19]

---

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 21st day of September in the year of our Lord one thousand nine hundred and twenty. Present: The Honorable MAURICE T. DOOLING, Judge.

No. 8602.

UNITED STATES OF AMERICA

vs.

LOUIS CABIALE et al.

**Minutes of Court—September 21, 1920—Trial.**

This case came on regularly this day for the trial of defendants herein, who were present with attorney, C. F. Tramutolo, Esq., B. F. Geis, Esq., and A. M. Hardie, Esq., Asst. U. S. Attys., were present on behalf of the United States. Upon the calling of the case all parties answering ready for such trial the Court ordered that the same do proceed and that the jury-box be filled from the regular panel of trial jurors of this Court. Accordingly the hereinafter named persons were duly drawn by lot, sworn and examined, etc., as follows: William R. Pentz, Alexander S. Ireland, Andrew Armstrong, E. H. Jones, Winthrop P. Austin, E. R. Brady, and John C. Bateman, accepted; J. M. Dupas, good cause appearing therefor, the Court ordered that said juror be excused; Warren Spieker, good cause appearing therefor, the Court ordered that said juror be excused; C. H. Adams, accepted; M. H. Falkenstein and Benj. E. Laskey, good cause appearing therefor, the Court ordered that said jurors be excused; Edwin R. Jackson, accepted; F. A. Smith, challenged for cause by the United States, allowed, and juror excused; F. W. Gerlash and Louis B. Gorgers, accepted; E. H. O'Brien, peremptorily challenged by the United States and excused;

and A. W. Hollard, accepted. Thereupon twelve (12) persons having been accepted as jurors to try the defendants herein were accordingly sworn, to wit: [20]

| | |
|---|---|
| William R. Pentz, | John C. Bateman, |
| Alexander S. Ireland, | C. H. Adams, |
| Andrew Armstrong, | Edwin R. Jackson, |
| E. H. Jones, | F. W. Gerlash, |
| Winthrop P. Austin, | Louis B. Gorgers, |
| E. R. Brady, | A. W. Hollard. |

Mr. Hardie made statement to the Court and jury of the nature of the case, and Mr. Geis called George W. Poultney, A. R. Shurtleff, H. M. Kupser, W. D. Smith, Sam Shaen, William J. Jordan, Harry C. Drew, W. L. Estelle, A. M. Hardie and R. F. Love, each of whom was duly sworn and examined on behalf of the United States, and introduced in evidence certain exhibits which were filed and marked United States Exhibits Nos. 3 (checks), 1 and 2 (same as 1 and 2 for identification), 6, 7, 8 and 9 (bottles and contents), and presented and filed for identification certain exhibits which were marked United States Exhibits 1, 2, 4 and 5 (for identification) (bottles and contents), and thereupon rested case on behalf of the United States.

Mr. Tramutolo thereupon moved the Court for an order to instruct the jury herein to return a verdict of not guilty as to defendant, Pietro Gavello and certain other defendants, which motion, after hearing Mr. Tramutolo, the Court ordered denied.

The hour of adjournment having arrived, the Court further ordered that the trial of this case be

continued to September 22, 1920, and that all parties be and appear accordingly. [21]

---

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Wednesday, the 22d day of September in the year of our Lord, one thousand nine hundred and twenty. Present: the Honorable MAURICE T. DOOLING, Judge.

No. 8602.

UNITED STATES OF AMERICA

vs.

LOUIS GABIALE, FRANK COPPOLA, PETER ZURICH, DANTE FORASIEPI, P. GAVELLO, ANDREW DONIZELLO, G. BERTOLOTTI, and ATTILIO PARCELLINI.

**Minutes of Court—September 22, 1920—Trial (Continued).**

This case came on regularly this day for further trial of said defendants, who were present with attorney S. F. Tramutolo, Esq., B. F. Geis, Esq., and A. M. Hardie, Esq., Asst. U. S. Attys., were present on behalf of the United States. The Jury heretofore impaneled and sworn to try said defendants was present and complete. Mr. Tramutolo moved the Court for an order instructing the jury herein to return a verdict of not guilty as to defendants,

Dante Forasiepi, Frank Coppola and Peter Zurich, and after hearing Mr. Tramutolo, the Court ordered that said motion be denied. Mr. Tramutolo, recalled W. D. Smith, who was further cross examined on behalf of defendants. Mr. Tramutolo then called Louis Cabiale, Frank Coppola, Peter Zurich (defendant), each of whom was duly sworn and examined on behalf of defendants. E. M. Ratto was duly sworn as interpreter herein. Mr. Tramutolo then called Dante Forasiepi (defendant) who was duly sworn and examined on behalf of defendants through interpreter. P. Gavello, Andrew Donizello, G. Battaglia, A. Cesena and E. M. Ratto were each duly sworn and examined on behalf of defendants. Mr. Tramutolo introduced in evidence a certain book which was filed and marked Defendant's [22] Exhibit No. 1, and thereupon rested case of defendants. Mr. Geis then recalled in rebuttal George W. Poultney, W. D. Smith, H. C. Drew and W. J. Jordan, each of whom was further examined on behalf of the United States, and thereupon rested case on behalf of the United States. The Court ordered that United States Exhibits 4 and 5 for Identification be introduced in evidence and the same were marked United States Exhibits Nos. 4 and 5 (bottles and contents).

The case was then argued by Mr. Hardie, Mr. Tramutolo, and Mr. Geis and submitted; whereupon the Court proceeded to instruct the jury herein, and as a part thereof withdraw the 11th Count of the Information filed herein from the consideration of the jury, and after being so instructed

the jury herein retired at 4:05 o'clock P. M., to deliberate upon a verdict and subsequently returned into Court at 6:20 o'clock P. M., and upon being called all twelve (12) jurors answered to their names, and in answer to question of Court stated that they had agreed upon a verdict and presented a written verdict, which the Court ordered filed and recorded, viz:

"We, the Jury, find as to the defendants at the bar, as follows, Louis Cabiale, Guilty on Counts 2, 3, 8, Not Guilty on Counts 1, 4, 5, 6 and 7; Andrew Donizello, Guilty on Counts 2, 3 8, 9, 10, Not Guilty on Counts 1, 4, 5, 6 and 7; P. Gavello, Head Waiter, Not Guilty on all Counts; G. Bartolotti, Bar Tender, Not Guilty on all Counts; Peter Zurich, Not Guilty on all Counts; Attillio Parcellini, Not Guilty on all counts; Dante Farasiepi, Not Guilty on all Counts; Frank Coppola Not Guilty on all Counts.

WM. R. PENTZ,
Foreman."

After hearing the respective attorneys, the Court ordered that matter of judgments as to defendants, Louis Cabiale and Andrew Donizello be continued to September 25, 1920, and in the meantime said defendants go at large upon the bonds heretofore given for appearance herein, and that the other defendants found not guilty be forthwith discharged, that they go hence without day and that their [23] bonds heretofore given for their appearance herein be exonerated. Further ordered that Defendants' Exhibit No. 1 be returned to the defendants, and

accordingly said exhibit was returned to defendant Louis Cabiale in open court. [24]

---

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 8602.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOUIS CABIALE et al.,

Defendants.

**Bill of Exceptions.**

BE IT REMEMBERED: That on the twentieth day of September 1920, the cause of United States of America, vs. Louis Cabiale, Andrew Donizello, Pietro Gabalio, G. Bertolotti, Peter Zurich, Attilio Porcellini, Frank Colai, Dante Forasiepi, came on regularly to trial before the Honorable Maurice T. Dooling, Judge of the above-entitled court, Ben F. Geis, Assistant United States Attorney and Albert M. Hardie, Assistant United States Attorney appearing on behalf of the United States, and Chauncey F. Tramutolo, Esq., appearing on behalf of the said defendants.

Thereupon a jury was duly empaneled and sworn, and the following proceedings were had and taken.

**Testimony of George Poultney, for the Government.**

GEORGE POULTNEY, called as a witness for the United States, and being first duly sworn, testified as follows:

I am a Federal prohibition agent and have been such since the time prohibition took effect, sometime in January 1920. I have seen all of these defendants at different times, some of them at the place of business and some at the Commissioner's office. I recall seeing them on the evening of the raid of what is called the Gianduja place. On the night the place was raided, I went there about a quarter past or half past nine at night. I observed the first gentleman with the mustache, the defendant Cabiale; the next gentleman he was at the cash register, and the third gentleman I observed going back and [25] forth in the restaurant. I don't think he was a waiter. That night I went to the restaurant, and I ordered dinner, and ordered four glasses of claret, which were served me, then, later on during the evening, I ordered four cocktails, which were served; two of the glasses of claret were drunk and two of the cocktails were drunk, and the place was raided, and some of the officers took the wine and cocktails that were remaining from the table at which I was sitting. There were four people with me that evening, Mr. Herbert who is now in Honolulu and two ladies. I don't know where the ladies are now. I did the ordering for myself and the other three, I ordered the meal and the liquor, I drank

(Testimony of George Poultney.)

part of it. I know it was claret. The place is located at 1549 Stockton Street in this city and county. After we drank the claret we ordered the cocktails, they consisted of some sort of an alcoholic concoction; off hand, I would say it was jackass brandy and vermouth. Four of these were ordered. I did not order any further drinks that evening, we did not have a chance to order any further drinks. I was in the place of Mr. Cabiale and these gentlemen on July 22, the evening before. I saw Mr. Cabiale there, I believe, on that evening, and I observed, as I was leaving, the gentleman with the bald head, next to Mr. Cabiale on that evening we bought four glasses of claret. On the first night, the first time we went there they charged 25 cents a drink for the claret; the next night for some reason, we did not pay anything at all. The reason was everybody said the place was raided, and we had better get out of there, so I, with my party, we got out, with the rest of the patrons of the place. On the evening of the 22d we paid for the claret, 25 cents a drink. On the 22d we had two rounds, we drank the claret; one of the glasses we poured into a bottle—one of the glasses of claret. The first night I had spoken to Mr. Cabiale and told him that I had come down for a little something to eat, and I wanted to get something to drink, and he said that was all right, I could have what I wanted. I do not see anybody here of these defendants that served the liquor on that night. (To Mr. Tramutolo.) I do not observe

(Testimony of George Poultney.)

anybody here who served me liquor on that particular night. (To Mr. Geis.) Well, Mr. Cabiale ushered me to a seat and [26] took my order, and subsequently I was served by a waiter. I gave my order for eats and drinks to Mr. Cabiale. (To Mr. Geis.) Yes, that is that bottle that I took with me to the Gianduja restaurant, with my label on it. This is the liquor that was served to me under my order, for which I paid and which I finally placed in this bottle.

On cross-examination the witness testified:

Prior to working as a prohibition enforcement officer I was in the army. I am not able to distinguish claret from grape juice by sight. I would have to taste it. I do not think I could judge as to the quantity of alcohol it contains except on a very strong drink. I would not have to rely as to the alcholic content of any liquor solely upon an analysis in all liquors. I would say in claret I would hesitate to state that it contained a great amount of alcohol, but in other liquors I do not think that I would hesitate to say. I came to the conclusion that it contained more than one-half of one per cent, by the taste of alcohol and the smell. On a good many things I think I could tell by the smell as to its alcoholic content, as to whether it contains more than one half of one per cent. I was there on the night of the 23d, the night of the raid. I procured a search warrant for the purpose of searching that place. I did not execute the search warrant personally, I procured it personally,

(Testimony of George Poultney.)

I rather think I delivered it to Mr. Wolff. I don't know what Mr. Wolff did before going to the place. Mr. Wolff was not with me. I am now speaking of Friday the 23d. The raid was conducted somewhere around 10:30, I should imagine. I went with Mr. Herbert and two ladies. I was not personally in possession of that search-warrant, I secured it from Judge Sawtelle. I think I gave it to Mr. Wolff. I made out this tag, that is my handwriting, I made it out that same evening. The waiter that served me with the claret, I do not see here. I say that Mr. Cabiale one of these defendants took my order, I am positive that I asked him for claret. I did not procure any liquor on the evening of the 22d other than those four glasses of claret. On the 22d I went there with another person and on the 23*th* I went there with three other persons. On the 22d I went there with a lady in no way at all connected with the enforcement office. The bottle that [27] I took away from the Gianduja Restaurant containing the drink that I procured there, I brought the next day personally to Mr. Love the Government chemist. Mr. Love did not return it; he returns us a written analysis of all liquor that he analyzes, and puts it in a pigeonhole and afterwards we get it when we need it. If I am not mistaken, I will say Mr. Love has initialed that label. I suppose he has some particular mark upon there that he could identify it with. On Thursday, at the time I accompanied this woman, I paid 25 cents a glass for the claret that

(Testimony of George Poultney.)

was bought. I tasted my own glass. On Friday evening, which was the following, I was accompanied by Mr. Herbert and two ladies. We procured four glasses of claret that evening. Nobody paid for that round of drinks. Someone said the place was raided and we had better get out, so the ladies that I was with seemed quite excited, they wanted to get out of the place, so we got out; they did not know that there was to be a raid on Gianduja's restaurant that night; they had no idea that anything was going to happen, they were not connected with the department in any way, manner, shape or form. They were just people we had picked up voluntarily, Mr. Herbert and myself. Some officers came along and they began to pick up glasses on different tables, and the waiters were running through the place saying, "Throw your wine away, the place is being raided, drink up your wine quick." So there was quite a bit of confusion, a good many people got up to leave, and with the crowd leaving I left also. That is the reason that I did not pay for the meal that I obtained and what I drank that night. Both food and drinks, probably, would run about $8 or $10. I had some cocktails also that night, I don't know what kind. I did not preserve them; the cocktails were taken off my table by one of the officers; I think it was Mr. Shurtleff, who seemed to come along there, and also Mr. Shaen, if I am not mistaken, took some from my table. Part was still in the glass. I was seated in the place quite a while before they

(Testimony of George Poultney.)

came in. They came to other tables before they came to mine as I was seated quite a ways from the door. Part of my wine might have been drunk; I drank part of the cocktail and part of the claret. With reference to the cocktails that I procured there I would say that it contained an alcoholic concoction of some kind. [28] I would say offhand that *if* contained vermouth. I have an idea what vermouth tastes like. I think it also contained jackass brandy. Jackasss brandy is an illicit distilled liquor, the tax on which has not been paid. Some refer to it as moonshine, I think jackass in the popular name for it. I have seen stills in operation in which the jackass brandy was being made. When I was served on Thursday night I said that I did not see any defendant here that served me. On Friday night that gentleman sitting away in the back there, the heavy set man, next to the man with the mustache served me. (Here the witness identified the man referred to as Mr. Frank Coppola.) Aside from Coppola, Cabiale and Donizello I do not recognize any of the other five defendants. On Thursday night I saw Mr. Cabiale and the gentleman behind him; on Friday night I saw Mr. Cabiale and the gentleman behind him and the other gentleman, Mr. Coppola.

On redirect examination the said witness testified;

The place is a good sized restaurant; I would not be able to give you the measurments; a good-sized dance hall there. I should say it is a larger room

(Testimony of George Poultney.)

that this. There is a dancing place there and music and singing. You might refer to it as a cabaret. I would say there are eight or nine waiters. The place seemed to be quite full of patrons—filled to its capacity, I think. I would say probably 150 people, in that neighborhood. I have not the least idea how late they keep open. The claret I drank on Thursday night and on Friday night seemed about the same.

**Testimony of A. R. Shurtleff, for the Government.**

A. R. SHURTLEFF, called for the United States and being first duly sworn, testified as follows:

I am one of the Government prohibition agents and was such in July of this year. I remember the occasion of going to what is known as the Gianduja place, that is where Mr. Cabiole carries on his place of business. On that evening I had occasion to take some liquor from that place. I took it from the table of the witness George Poultney. I took it down to a little counter where they had the cash register, at the entrance to the barroom, and gave it over to Mr. Kupser; I put it in a little flask that I took there for [29] that purpose. The flask I took out of our stock room in the Appraiser's Building. The flask with the tag on it is the flask and the liquor that I placed in it. That is my tag, in my handwriting. That was received by me on the evening of the raid, which I understand was on the evening of the 23d of July, Friday evening, in the place known as the

(Testimony of A. R. Shurtleff.)
Gianduja place, conducted by these defendants, or some of them.

Q. On that evening, Mr. Shurtleff, will you state to the jury and Court whether or not you observed liquor on the other tables, generally or promiscuously, in that place?

To this question counsel for the defendants then and there objected upon the ground that the same was incompetent and irrelevent and not binding upon the defendants. This objection was overruled by the Court, to which ruling of the court counsel for the defendants then and there duly excepted.

The WITNESS.—(Continuing.) As we entered the place, I was surprised at the amount of colored liquid or liquor that was on the different tables. As I proceeded in, there were two couples sitting at a table, two men and two women, and I told them who I was, what my business was there, and proceeded to take the wine off the table. I gathered up all I could possibly carry from two tables at a time, and took it back to the counter, where John Kupser was sitting, and told him to take care of it. After taking one back, I went right up to the dining-room and went to the table where George Poultney and party were sitting. The wine and the cocktails which they had at this table they had removed from the top of the table, and were hiding it underneath. I told them who I was, and that I wanted what they had in the glasses, and took the cocktails and the claret away from them and took it back to Mr. Kupser, and he put it in this flask.

(Testimony of A. R. Shurtleff.)

(To the Court.) It was mixed, the cocktails and wine were put into the flask. (To Mr. Tramutolo.) All four into that one flask, from Mr. Poultney's table. The other liquor that was taken from the other tables was put in a bottle that I picked up back of this counter and washed out, in that bottle sitting there; it was a black bottle. I would not say that I could identify that particular bottle, but I was particular in labeling this one bottle from Mr. Poultney's table. After the liquor [30] was gathered from the tables, there was a good deal of confusion, and the people were moving out and in, and I stepped down toward a door that is about in the center of the hall leading into the barroom, and I noticed quite a bit of liquor in there that the men in that particular part of the building had gathered up. They had some in a pitcher, and also had some in bottles.

Thereupon the said bottles were marked for identification, the large bottle as U. S. Exhibit 2 and the small bottle Exhibit 1.

On Cross-examination, the said witness testified:

I was in the place on Friday July 23d, the night of the raid. I got into the place thru the front entrance. The place is at Stockton and Union, on the corner, and there are several entrances. I went in from the east side, on the Stockton street side. John Kupser went in with me, I would not say that we were the only two who entered that door. I know John Kupser and I went in together. I went up to the couples at one table, I observed

(Testimony of A. R. Shurtleff.)

liquor there. I should say it was wine, from the color of it. I sampled it at the table, I should say it was claret wine. I gathered that up, and the next table to it, and took it back in glasses. That was not poured into the bottle which has just now been introduced, it was put into another bottle. (To the Court.) This here came from the table of Mr. Poultney and the parties sitting at the table.

That is my handwriting on the label which was attached by me that night. It was taken to the prohibition enforcement office and up to the chemist. It was under my custody at all times. I was riding right in the wagon with it all the time. The first table I stopped at was this table where these two couples were. I went to the second table and gathered up all I could possibly carry from the two tables, and carried it back to the counter. That was put in a big bottle that I picked up from behind the counter. That was taken along with me that same night. After that I went to Mr. Poultney's table where Mr. Herbert and Mr. Poultney and two ladies were sitting. It was to the rear, I should say just about the end of the platform where you go down into the dance hall. I imagine some of the liquor had been spilled, because they were trying to hide the cocktails and wine under the tablecloth. There were perhaps fifty people [31] in the place, of course, I did not get to see all of them, but they were doing a good business that night. I did not create considerable confusion when I went in. I spoke to several people, I told them who I was. I

(Testimony of A. R. Shurtleff.)
told them to go ahead and finish their dinner. I cannot say that I saw any particular waiter serving liquor. I do not know whether any defendant served that liquor on that particular occasion to that party.

On redirect examination the witness testified:

On that night I saw the defendant Donizello and the man next to him. I would not say that I saw Mr. Cabiale. I was too busy to pay much attention to all of these men, but I remember those two in particular. Mr. Donizello is the man that walked up to me at the time we entered the place. The cocktails and the claret in the bottle that has been introduced were taken up to the chemist the next morning, if I remember correctly.

**Testimony of H. M. Kupser, for the Government.**

H. M. KUPSER, called as a witness for the United States and having been first duly sworn, testified:

I am a prohibition agent and have been such during all of this year. I was present on the evening of the 23d of July of this year at the place known as the Gianduja place, where the defendants, here, conduct their business. During the raid that night of the Gianduja café and restaurant, I was instructed to take a position near the cash register, or where the checks were paid, and there I received the liquors which were taken from the various tables, and took charge of those. I will state in particular that the various liquors that were

(Testimony of H. M. Kupser.)

brought up, the liquors which were seized on the table occupied by Mr. Poultney and his friends that night, those liquors were brought to me by Agent Shurtleff and Agent Shaen, and the liquors seized from that particular table were put in a separate bottle. This bottle now shown me is the bottle containing the liquid that was taken from Agent Poultney's table. The other liquors, which were taken from the other tables, were put in other bottles, but the other liquors which were taken from the other parts of the premises, such as the bar, I had nothing to do with. I believe they were subsequently taken to the Government [32] chemist. I recognize the defendant Cabiale, sitting directly back of Mr. Tramutolo, and I also recognize the large gentleman with the mustache. I believe he was in charge of the bar in the saloon premises. I noticed as the various waiters would come up with their tags, they would have some sort of a tag and would produce it at the cashier's, where he registered it, and the amount was rung up according to what appeared on the tag. The tags were then put in the cash register. I got some of those tags on that evening. These are some of those tags which were in the bundle in the cash register. I did not put any marks on them, I put no identification marks on them. I believe they were turned over to Mr. Shaen; that is, after we arrived back at the Agent's office they were put in his desk.

Thereupon the United States Attorney offered

the said tags in evidence; the two offered read as follows:

"Gianduja Restaurant, Waiter No. 10, Check No. 24. Number of persons. 2 Cafe Royal $1. 1 Whiskey, 74 cents. 2 wine, 50 cents, $2.25. War tax, 10 cents. $2.35."

"Gianduja Restaurant, Waiter No. 10, Check No. 36. Short 25 cents. 2 Cafe Royal $1. 2 Whiskey $1.25. 1 wine 25. Total $2.50."

To the introduction of this evidence counsel for the defendant then and there objected upon the grounds that there was no means of identifying the said tags and that the same were not taken pursuant to a search-warrant.

The COURT.—You cannot raise that question here in the middle of the trial. There is a time and place to try that issue. You cannot try it here now.

Mr. TRAMUTOLO.—Here is our situation—

The COURT.—(Interrupting.) I do not care to hear about it from you now. I am quite familiar with the law, and have been quite lenient with defendants in enforcing it.

Mr. TRAMUTOLO.—We are trying a collateral matter here as to checks that were found there.

The COURT.—We are not trying any collateral matter. These men are charged with the sale of liquor. They say they did not sell the liquor there. In their cash register is found a check which on its face purports to be a check for [33] the sale of whiskey and the sale of wine. The defendants

(Testimony of H. M. Kupser.)

can make such explanation about that as they desire later on.

To this ruling of the Court counsel for the defendants then and there duly excepted.

On cross-examination, the said witness testified:

The liquor that was procured from Mr. Poultney's table was brought to me at the cash register. I poured it into the bottle; that tag was placed there by Mr. Shurtleff, in my presence. That was at the time that the liquid was poured into the bottle. The liquid was brought to me in glasses and then poured into that bottle by me. Mr. Shurtleff brought part of it and Mr. Shaen part. There were four glasses brought to me in all. The contents of the four glasses brought to me by Mr. Shurtleff and Mr. Shaen were poured into that bottle. I identify Mr. Cabiale as being there that Friday night. I believe that I recognize the little fellow; I am not certain, but I particularly recognize the gentleman with the mustache. As to the other defendants, I am not certain as to their identity. I was stationed by the cash register in the dining-room. The cash register is close to the door on the east entrance of the restaurant. I believe the gentleman sitting directly back of you was behind the cash register taking in money while I was standing there. I was there during the entire investigation. I believe we entered the place about ten thirty P. M. We were probably in there an hour or thereabouts. These checks which I have identified were found in the cash register. I do not

(Testimony of H. M. Kupser.)

know, of my own knowledge, that Mr. Shaen and Mr. Shurtleff brought liquor from Poultney's table. They told me they did. I did not see them get it at Poultney's table.

**Testimony of W. D. Smith, for the Government.**

W. D. SMITH, called as a witness for the United States and being first duly sworn, testified:

I am and was on July 23d last, a prohibition agent. I was present at the time on the 23d of July, when a raid was made on the Gianduja place. I entered the barroom on the Union Street side, followed by Thomas, Wolfe and Shaen. The bartender was at the end of the bar, right as we went in. That [34] gentleman in the middle there, with the moustache, the big man, was the bartender. I think he was standing there when I went in; as we came in he started toward the middle of the bar, and not knowing what he might have been going there to do, I thought he might try and dump some stuff, I went over the bar and stopped him, and on the drain board I picked up a pitcher, a porcelain pitcher about half full of wine; I handed that pitcher to Mr. Thomas; he came behind the bar, and I handed it to him. Just then one of the waiters came running out from the restaurant proper, and he had a glass in his hand, and seemed very much excited, saying something about revenue men raiding, something like that, so I went over and took a glass away from him and turned that over to Mr. Thomas; I believe that man was the

(Testimony of W. D. Smith.)

defendant Dante Forasiepi. Next I saw a man running right thru the door—I saw a man running at a pretty good speed, I didn't know what he was up to, so I left the other two men at the bar and followed him, and I lost track of him in the confusion; I did not know where he went to, so I went back to the restaurant, and then I went down in the basement and searched the basement and found nothing there. I cannot identify the man that ran, from any of these that are here. I saw the figure of a man going by the door, and I ran out to see who it was, but I did not see him. When I came back from the basement I went to the restaurant and they were moving the liquor in the restaurant up to the cash register. Kupser was there, I believe. I stayed there until they telephoned for the patrol wagon; the patrol wagon came, and, in the meantime, the men out in the bar had taken the stuff, the bottles, I don't remember how many, I think five or six bottles, and put it in a box, and by that time the bartender wanted to go upstairs and change his coat, so I went upstairs with him, while he changed his coat, and then came down and got into the wagon with the rest of them.

On cross-examination, the witness testified:

This was on Friday night, July 23d, around 10:30 or 10:25. Enforcement officers Wolfe and Thomas were with me. There are two doors to the barroom leading out to the sidewalk, one on the Union Street and one on the Stockton Street side. Wolfe stayed outside of the [35] bar and locked the

(Testimony of W. D. Smith.)

door. I jumped over the bar. Thomas did not jump over. I am absolutely sure of that. I don't know that anybody guarded the door on the corner of Union and Stockton Streets. I know that Mr. Wolfe locked the door. He locked both of them. I did not make a search of the back bar, I jumped over the bar and got this pitcher on the drainboard. I found this wine at the end of the bar as you go in from Union Street. I smelled what was in the pitcher. I did not taste it. I can tell wine by smell. I could tell you the difference between wine and whiskey and a soft drink smell. Prior to working as an enforcement officer I was in the United States Army. I had had no experience with tracing sales of liquor prior to joining the army. I saw Mr. Poultney that night. He was sitting at the rear end, pretty near the rear end, as I remember.

**Testimony of Samuel Shaen, for the Government.**

SAMUEL SHAEN, called as a witness for the United States and being first duly sworn, testified:

I am a prohibition and internal revenue officer and was such on July 23d last. I was present at the place known as Gianduja's place on Friday, July 23d of this year, at the time this raid was made. We entered the place, at least I entered the place, with three others on Union Street, and as we walked in we saw waiters with trays delivering liquor to the different tables, and we started after one of them, that is, Jordan and I, and when he

(Testimony of Samuel Shaen.)

found out that we were revenue officers he upset the tray and spilled the contents, and then we started in different directions. I went to a table that was occupied by two gentlemen and two ladies, and I found that they were drinking claret, I suppose it was—I know it was claret—and they were hiding it under the table when we came in there, and I took one glass away from one of the men sitting at the table, and took the glass of claret up to the front of the restaurant and placed it on the counter; a man named Kupser was in charge of that part of it. Then I went into the barroom and there were a couple of agents in there, and I went behind the counter, and examined some of the lockers with one of the agents, and took several bottles from behind the counter, from these lockers. That is one of the bottles that was taken out of the lockers at that time. We put this on top of the counter. We took it down to the Appraisers' Building [36] and put it into the room which we were occupying at that time, and subsequently it went to the chemist for analysis. We sealed these bottles up; put sealing wax on every bottle that we took. This bottle, vermouth, was one of the bottles we got from the lockers. We took it away that night to the Appraisers' Building and subsequently it was delivered to the Government chemist for analysis.

(Thereupon the bottles in question were marked 4 and 5 for identification.) Besides these two, there were six bottles, I think, altogether, that we took with us that night when we left. I recognize

(Testimony of Samuel Shaen.)

Donizello as having been there that night. He was serving at one of the tables as a waiter; and I took him and placed him in charge of one of the men at the outer door, that we had closed at that time. I asked him to go out there because he was under arrest. I saw him go to a table, I think, where these four people were. The reason I can identify him particularly is a little while after we got through in the bar he asked me if he could not go to some of the tables and collect some money from people he had served, and I said all right, and I watched him go to two different tables, and when he got through with those tables, he came back and said he would like to go down and change his clothes, and I said all right, and I took him to the head of the stairway leading into the basement, where the lockers were, I presume, and Mr. Estelle was down there with another man, and I waited a little while and he did not come back, and I went down and asked Estelle where the other man was, and he said he didn't see any other man; he had disappeared in the meantime; I don't know where he went to. This is the first time I have seen him since then. I am almost positive Peter Zurich is the man I went after who upset the tray.

On cross-examination, the witness testified:

The officers that entered the premises with me on the Union Street side were Mr. Jordan, Mr. Drew and Mr. Estelle. We entered on the Union Street side which takes you into the restaurant proper, right where the little boxes are. We went into

(Testimony of Samuel Shaen.)

the main dining-room at first. I saw Mr. George Poultney in there. I grabbed a glass of liquor from Mr. Herbert, one of the men sitting at Mr. [37] Poultney's table. I took it up to the counter where Mr. Kupser was standing and handed it to him to keep, to hold it for evidence. I did not see what Mr. Kupser did with the evidence. I then went into the bar. I stayed in the main dining-room just a few minutes; there was excitement among the guests; the people got up from the tables; there was not much else to do right there, and I went into the bar. I was not served with anything. I saw people being served, and, as I say, they asked me if they could not go and collect money for what they had served. I did not see this man serve the liquor (referring to the defendant Donizello). I found this bottle labeled 'Vermouth' behind one of those sliding glass doors behind the bar. I did not sample it; I don't think I even smelled it. I do not know who found the other stuff there, of my own knowledge; Thomas and I were searching behind there. Mr. Wolfe was in front of the counter. Smith was on the outside of the counter. He was not doing any searching at that time. I don't know whether he did any searching at all. I am only talking of what I know as to who was behind the bar. I think most of the stuff that was carted away was on the counter—there might have been one bottle found after I got through there, but at that time Wolfe was in front of the counter to see that it would not be

(Testimony of Samuel Shaen.)

taken away by anyone. I don't know who placed all of these bottles in a box. I went down with the box to the wagon. The box was not particularly in my custody; we were all there and left together and placed the stuff in the Custom-house. There were only four in the bar at that time. The other men only know what I found there by what I told them. They saw it taken away from there, because we went down in the patrol wagon with them. I think Thomas found three bottles before I got there. (To the Court.) I think there were six or seven altogether. I did not label the bottles myself. They were not labeled in my presence. I recognize those two particular bottles I found. I found that bottle of vermouth and I said to Thomas, made the remark, "Here is a bottle of vermouth"; and then I found that bottle. I know that bottle by that straw stuff around that maraschino bottle. [38]

On redirect examination, the said witness testified:

The liquor that is here in the bottles that I secured at the Gianduja place was taken into the Custom-house, into the room that I opened. I opened the door to let them bring it in. Subsequently it was taken out of there by some one and taken to the chemist for analysis. Who took them up I don't know.

On recross-examination the said witness testified:

I could not tell you positively how soon after this

(Testimony of Samuel Shaen.)

raid the bottles were taken to the chemist. I did not keep a record; the agent would bring in things —they would just bring them in and label them, and they would then go into a room that we had, another room altogether which we kept under lock and key. I am not the custodian of the property seized. There was only one key to the room; we had it in Mr. Considine's office. An agent, when he seizes any property at all for the evidence brings it down and labels it himself, and then he takes it, as a general rule, to the chemist himself, for analysis; the chemist then makes a report to our office in duplicate, of anything that is taken up to him, but there is no record kept by me or anybody else, except they get a report from the chemist. The man who makes the seizure keeps the record himself. I do not know, in the case of these particular bottles, who took them to the chemist. They were labeled by someone else, someone who was connected with the raid. The fact that I found those two particular bottles cuts no figure, because Thomas got some, and maybe somebody else got some, and one man attended to all of that, one of the men who was in the expedition. As far as labeling is concerned, one man does that part. It does not make any difference which one in the party does it, as long as it is done.

**Testimony of William J. Jordan, for the Government**

WILLIAM J. JORDAN, called as a witness for the United States, and being first duly sworn, testified:

I am a prohibition agent and have been such for all of this year. I was present at the raid that was made on the place known as the Gianduja place, where these defendants were found. That night, Mr. Shaen, Mr. Estelle, Howard Drew and I went into the Union Street entrance, and as we went in the door this gentleman [39] over here on the left, that one with the bushy hair, he was coming in with a tray of wine (referring to Attilio Porcellini). I went in and he passed in front of me, and he had a tray with him with six or eight glasses of wine on it. I stepped around, ahead of him, and asked him, "What have you got there?" and he asked me, "Who are you?" and I flashed my badge and told him who I was, and so he immediately took the tray and threw it up into the air, and so I grabbed him and brought him over and turned him over to Howard Drew. By "throwing it up in the air," I mean he spilled it before I had a chance to grab it, and he made the remark it was grape juice. So we went around the place and picked up some wine—I did not—some of the other men did—and Poultney and Herbert were sitting down to the table, and Shurtleff and Kupser went over and took some of their wine—Shurtleff, I mean; Kupser was over at the cashier's desk—and they brought the drinks over. Donizello was by

(Testimony of William J. Jordan.)

the cash register, and this man here with the mustache was in the bar, the big fellow. Forasiepi was serving wine around there, and he was just coming out of the saloon part of it, so somebody said to me, "You had better take care of him." He wanted to get his coat and wanted to collect some bills around there from different people at the tables; then finally he got his coat and we got into the wagon and took them down to the city prison, and he told me he had a wife and three or four children, and he did not want to go to jail that night, so I told him all right, he could go home, I did not want to worry his wife and children, and we could pick him up next day, which we did. At the end, just before we went out, the liquor was all together on the end of the bar; it was in a box, so Wolfe went and called the patrol wagon, and we took these gentlemen and put them in the patrol wagon.

The COURT.—Which ones?

A. The man on the end, this man with the mustache, this man here. There were four of them in the wagon.

Donizello was in the wagon that night, and the man with the mustache and the man on the end, and the other man I don't remember. This liquor that was procured or placed in bottles was put in a box and we took it down to the Custom-house. From that place it was taken by some one to the chemist. [40]

(Testimony of William J. Jordan.)

On cross-examination, the witness testified:

I did not make any test there. I did not see anybody else make a test. There is a door that fronts right on Stockton Street, which we will call the easterly door, and there is a corner door which enters the bar. I came in the door on the Union Street side that is not anywhere near the barroom. When I came into the place I saw Mr. Kupser up there by the cash register, behind this crescent-shaped counter, that is in the dining-room proper. Donizello was beside Kupser, he was not attired as a waiter. Mr. Shaen was not with me all the time. You see there were 300 or 400 people around there, and as soon as we got in the door I went after the waiter, and Mr. Shaen was not with me all of the time. The man that I grabbed was the man over at the end with the bushy hair. I did not take him in the police wagon, someone else took him. I do not know if Mr. Shaen saw him between that day and now. If I remember, Mr. Shaen went down to the police department with me. I can identify three of the defendants that went down to the station at that time; I cannot identify the fourth. I let the man with the mustache go home. He told me he had a wife and two or three children, and they would be worried if he did not come home, and I told him he could go and we would pick him up later. This other man, Porcellini, had a tray with 5 or 6 glasses on it, full of wine. I know wine, I can tell wine by the smell of it. I can pretty near tell it by sight when they knock it all

(Testimony of William J. Jordan.)

over you and you get it over your hand. I didn't have a chance to distinguish the color, but it was the color of wine. As soon as he saw my badge he threw it up and spilled it all over me, and then I hustled him along to the dance hall. Poultney and his party were sitting to the left, coming in from the Union Street entrance.

**Testimony of Harry Z. Drew, for the Government.**

HARRY Z. DREW, called as a witness for the United States and being first duly sworn, testified:

I am a United States Prohibition Agent and was last July. I was present at the time of the Gianduja raid. I was placed in charge of the Union Street entrance to the place, with instructions to let nobody out until I received [41] further orders from the Deputy Chief Agent, Mr. Jordan. I remained there, with two of the waiters in my custody, until the place had been searched; the two waiters were then turned over to Mr. Shaen to go down and change their clothes. I went in charge and took charge of a box containing six bottles of liquor, and removed it to the police patrol, where it was taken as far as the Hall of Justice, and from the Hall of Justice Agent Smith and myself carried the box containing six bottles of liquor down to the Appraisers Stores Building, and placed it in the storeroom set aside for that purpose. As to the raid, I don't know a great deal, excepting that I took charge of one waiter, who was struggling with Agent Jordan at the time, and I held

(Testimony of Harry Z. Drew.)

him there. They had a struggle over a glass of something that the waiter had in his hand. Agent Jordan called to me to come and take the man, and I took him out near the Union Street door and held him there. Another waiter was later on turned over to me. I can identify Porcellini and the second man from the wall. I would say that these bottles are the bottles that I saw that night in the box.

On cross-examination, the witness testified:

Four of us entered that Union Street door, that is the door that leads into the restaurant proper. I am positive of my identification of the heavy-set man as being the one I arrested that night. I held him there just inside the Union Street entrance. The man turned over to me by Jordan was Porcellini. I would not say for certain how long I was at that door; I would judge in the neighborhood of half an hour, a little more or less. I didn't observe whatever was found there until after it had been gathered and placed in the box. All I claim to know about it is that I saw the stuff in the box, and placed it in the box, but I did not see it gathered up. The corks were sealed, with the exception of one bottle. I did not see the bottles labeled. I do not know who took them to the chemist and I don't know who labeled them. I don't claim those labels are restricted to those bottles only. I did not accompany those waiters to the city prison. I rode down as far as the city prison on the patrol wagon, and when we arrived at the city prison Agent Smith

(Testimony of Harry Z. Drew.)

and I took charge of the box that contained the [42] bottles, and walked down to the Appraisers Store Building with it, and put them away. Agent Smith and I put the box in the room where the evidence is kept. Agent Smith had a key to the room. He accompanied us, as did also Agent Jordon. Practically all of the agents that could get on the patrol wagon were on it as far as the Hall of Justice. I could not see what Porcellini, the man whom I say was grabbed by Mr. Jordan, was carrying because just at the time I had not been able to quiet some of the people down yet who attempted to get out of the place; my instructions had been to allow nobody to leave until I received orders to that effect. Some of the patrons became very much excited. I guess the majority of the people there made a rush for the door I was standing in front of, and I had quite a little time getting them back and in quieting them down and explaining to them that they would not be held in any way. Several of them were under the influence of liquor, and it took quite a little talk to them to get them to go back; in fact, I had to make a display of force to get them to go back, in order to protect myself. The force I used was a Colt's revolver. I allowed them to get within three feet of me, and some of them looked as though they might go too far unless I used means to stop them. I was alone at the time at the door. I did not see what Porcellini was carrying at the time. At the time I went to the assistance of Mr. Jordan, I did grab that man,

(Testimony of Harry Z. Drew.)

as you say, and pulled him out in the entry way. Agent Jordan told me to handcuff him. At the time I did not have handcuffs with me. He made the remark not to mess him up, and I told him to be quiet and nothing would happen to him and he would not be messed up. I did not see Coppola with anything in his possession.

**Testimony of A. L. Estelle, for the Government.**

A. L. ESTELLE, called as a witness for the United States and having been duly sworn, testified:

I am, and have been for a year or so, a prohibition agent. Two years prior to that I was an army officer. I accompanied the raiding party to the Giand*jua* place on the 23d of July of this year. I entered the place, accompanied by three other agents, Mr. Jordan, Mr. Shaen and Mr. Drew. We entered from the Union Street entrance. I was designated by Mr. Jordan, who was the [43] head of our party, to take charge of any persons that might be arrested and turned over to me. I stopped just inside the entrance, opposite the checking-stand. Two prisoners, two waiters, that is, men in waiter's clothing, were turned over to me to keep there while the raid was going on. I kept those waiters there until the raid was finished, and I turned them over to Mr. Drew. I was put in charge of the prisoners, and I took them to the city hall and booked them, accompanied by Agent Wolfe. That was the part that I played in it.

(Testimony of A. L. Estelle.)

When I went down into the barroom, there were six bottles in a box setting on top of the bar, near the end of the bar; I saw them there. Mr. Wolfe was standing there, with a search warrant; he was standing near the bottles. They were turned over to two of our agents, Mr. Smith and Mr. Drew. I do not know of my own knowledge where the bottles were taken. The four standing on Mr. Geis' table and the two on the clerk's table are the same bottles. Yesterday, at your direction, I went to Mr. Copestake, who had charge of them up in your office, and asked for them, in order that I might take them to our chemist for analysis. They were turned over to me and I then carried them down and turned them over to the chemist, Mr. Love. At that time five of them were sealed and one was not.

On cross-examination, the said witness testified:

Yesterday I took the bottles to the chemist, two of which are introduced in evidence and are on the clerk's desk, and four that are on his table. As far as I know that was the first time they had been taken to the chemist. I don't know of my own knowledge who brought them up to Mr. Copestake. I did not place any mark of identification on those bottles when I took them from Mr. Copestake. I know by their looks, and the lables on the bottles, that they are the same. I don't know how many people were in this restaurant on the night of July 23d. In the portion next to me, where they were dancing, I

(Testimony of George R. Poultney.)
would estimate it at probably 100 people. I would say, altogether, that I stayed at the Union Street entrance door, thirty minutes.

**Testimony of George R. Poultney, for the Government (Recalled).**

GEORGE R. POULTNEY, recalled for the United States, testified:

Referring to the two bottles sitting on the clerk's desk and the [44] four bottles before me, I brought those bottles in a box to this office and turned them over to Mr. Hardie, to the United States Attorney's office. I got them from the Appraisers Building in the room that is kept for the liquor. They were in the same condition when I turned them over to Mr. Hardie as they were when I took them out of the appraisers building. The small bottle, that the tag is in my handwriting, I took that to Mr. Love, the chemist. The contents are the same as when I took it from the Gianduja place.

**Testimony of A. M. Hardie, for the Government.**

A. M. HARDIE, called for the United States and having been first duly sworn, testified:

I received the four bottles that are standing on the table here and the two bottles on the clerk's desk from Mr. Poultney. At that time I had the key to our liquor safe and I placed them in the safe. They are now in the same condition as far as the contents are concerned, as they were when Mr. Poultney gave

(Testimony of A. M. Hardie.)

them to me. The contents of the bottles at the present time are the same contents as when I got them from Mr. Poultney.

**Testimony of R. F. Love, for the Government.**

R. F. LOVE, called for the United States and having been first duly sworn, testified:

I am employed by the Government of the United States as a chemist. I have seen United States Exhibit No. 4 for identification. At the time that bottle was handed to me it was sealed. I analyzed it; I determined the alcoholic content of it. It analyzed 33.1 per cent alcohol by volume. I received the bottle from Mr. Estelle. I analyzed United States Exhibit 5 for identification, and the result was alcohol 2.55 per cent by volume. I received from Mr. Estelle a bottle referred to as being in the box. I analyzed it, with the result, alcohol 17.8 per cent by volume. Another bottle, heretofore testified to, I analyzed with the result, alcohol, 48.6 per cent by volume. (To the Court: I think that one contained whiskey). Another bottle testified to as being in the box was handed to me by Mr. Estelle and I made a chemical analysis of it, with the result, alcohol 45.25 per cent by volume. I think that was brandy, but I am [45] not sure. Another bottles testified to as having been in the box, I made a chemical analysis of, with the result, alcohol 45.25 per cent by volume. (To the Court: That would be about 90 proof).

(Testimony of R. F. Love.)

Thereupon the prosecution offered the said exhibits and bottles in evidence, to which counsel for the defendants then and there objected upon the grounds that the witness Poultney did not see any of the said property found and that there was no testimony that the said witness saw the same in the box. The Court overruled the said objection. To which ruling counsel for the defendants duly reserved an exception.

The WITNESS.—(Continuing.) I made a chemical analysis of United States Exhibit No. 2 for identification, testified by Mr. Shurtleff as having been handed to me for analysis, with the result, 10.3 per cent alcohol by volume. In my judgment it is claret wine. I made a chemical analysis of United States Exhibit No. 1 for identification, with the result that I find it contains 9.74 per cent alcohol by volume. In my best judgment the contents of the various bottles are fit for beverage purposes.

Thereupon counsel for the United States offered the two last mentioned bottles in evidence, to which counsel for the defendants made the same objection stated to the rest offered. The court overruled the said objection, to which ruling of the Court counsel for the defendants then and there duly excepted.

On Cross-examination, the said witness testified:

I did not drink any of the contents. I did taste one or two. I think I tasted the one labeled Vermouth and the one labeled Marascino. I have never seen any of that vermouth before. I received the

(Testimony of R. F. Love.))

two bottles last identified by me on July 26th. I know, as a matter of fact, that grape juice in a bottle will turn to wine. I don't know whether Marascino is used for beverage purposes. I placed marks of identification upon the exhibits furnished to me for analysis so that by the labeling or by the wording I identify the contents. In making my analysis of United States Exhibit 2 I would say it was all wine. (To the Court: I analyzed it only to ascertain its alcoholic content). I would say that these two articles, Exhibit 1 and Exhibit 2 are wine. [46] Grape juice exposed to the air will acquire the same alcoholic content as wine when it is originally made, in time.

On redirect examination, the said witness testified:

For grape juice of the proper standard to turn into wine, containing the alcoholic content of Exhibit 1 and 2, might occur within three or four days. It is not absolutely essential to that process that it be exposed to the air. Some substance, like yeast, is apt to start fermentation. Grape juice kept in a bottle without any supplement to it does not turn. If the air can get in it will ferment. I don't think the staves of a new barrel are porous enough to allow enough air to get in to cause fermentation. The slightest air that may get into that barrel will probably turn the barrel, or its contents, into wine.

**Testimony of A. R. Shurtleff, for the Government (Recalled).**

A. R. SHURTLEFF, recalled for the United States, testified:

At the time I secured Government's Exhibit No. 1 I sealed the bottle and kept it sealed until I gave it to the chemist. I suppose it would be exposed two or three minutes that night.

THEREUPON the Government rested its case.

Thereupon counsel for the defendants moved the Court for a directed verdict, upon which motion the following proceedings were had:

Mr. TRAMUTOLO.—If your Honor please, I desire to make a motion for a directed verdict as to a number of these defendants. Many of them have been assembled here just because they happened to be there that night. Why they did not bring the cooks and utensils along is something I don't know. But there are a few defendants in this case that have not been identified as having been there that night. I desire to recall the testimony of the various officers as to the people who were identified as having been there on the particular night of July 23d when this raid was made.

There has been no identification of this particular man, Gabalio. The sole testimony of Officer Poulney was that he saw Donizello there, and that he believed that Peter Gabalio was there; and by saying he believed—I don't want to misconstrue what the evidence really was, and any misstatement [47] I might make with reference to the defendants

who have not been properly identified I do not do it wilfully, I am doing it from my notes that I made and from my memory. But assuming that all of these defendants were there, if your Honor please, the Government must still prove, before it could expect us to overcome its case, it is not a *prima facie* case, the mere presence of an employee at a place where liquor is found, any more than if they arrested every individual who was in that place as aiding and abetting the commission of a crime, because the people who procured that liquor, if it was procured from these defendants, are just as guilty.

The COURT.—Maybe they are.

Mr. TRAMUTOLO.—I anticipated your Honor's point of view, and I do not argue that because certain ones are eliminated, and some are made "goats" of, if I can use that term, but there must be something more to connect some of these people who have been merely haphazardly identified as having been there with a direct charge in this complaint or this information.

There are eleven counts in this information; nine of them are that claret was sold to Mr. Poultney, who makes the affidavit which the Government relies on to substantiate the charge in the information, because the information reads, that the affidavit is hereto attached—you have seen so many of them it is not necessary for me to go into the point. The Government relies upon that affidavit. If you will look over that affidavit, the affiant makes

twelve specific charges of sales. If there is one order placed by Mr. Poultney—which is true, he placed one order Thursday night, and one order Friday night, the service to those four individuals at that time does not constitute four separate violations, it constitutes one transaction, for which there has been no proof that any money was paid. In addition to the place being conducted as a common nuisance, we are obliged to meet the charge of a direct sale to Poultney. There are eleven counts in the information, and still the affiant has made twelve separate statements in his affidavit, or that he made twelve separate buys. Now, either it was charitable on the part of Mr. Geis or of Mr. Hardie, because they only placed eleven counts. There is an inconsistency between the [48] averments in the information and the proof. The affidavit was made by Mr. Poultney in this particular case. Who did Poultney say served him with this liquor? If my memory served me right, if my hand did not write something that my mind did not want put down, he testified that on Thursday night he saw Cabiale there, the gentleman who is seated right behind here, and the gentleman behind him, Mr. Donizello, and that he believed that Gabalio was there, and that Mr. Donizello took his order, and that the service was made by Coppola, the gentleman sitting the last one over there. The identity of a number of these defendants—and the Government should be frank enough to state to this Court and to this jury, and particularly to this Court,

those who it would compel to take the stand and state that sales were made. Mr. Poultney did not pay any money. We are meeting the charge of selling.

The COURT.—That does not affect the sale. Many a man sells his property and never gets any money for it.

Mr. TRAMUTOLO.—It is apparent that Congress had in mind the transaction of a sale.

The COURT.—You know what a sale is. A sale does not involve payment.

Mr. TRAMUTOLO.—But Congress must have had that in mind, because it says, "Whoever shall furnish."

The COURT.—There is no necessity of arguing that. You are too good a lawyer to know that a sale does not require payment. He may owe it to him yet, he probably does.

Mr. TRAMUTOLO.—But we will wait a long time to collect it, your Honor.

The COURT.—If you undertake to collect, he might well defend the declaration that it was an unlawful transaction. I will let the whole matter go to the jury. Motion denied.

Mr. TRAMUTOLO.—I will reserve an exception.

The COURT.—We will meet to-morrow at ten o'clock, gentlemen.

Mr. TRAMUTOLO.—Before adjourning, may I make an objection which I intended to make at this time? At the time the books were introduced, on

the additional ground that they are not the best evidence. [49]

The COURT.—I don't like *post mortem* objections, but you can make it.

Mr. TRAMUTOLO.—It is not the best evidence.

The COURT.—No, the best evidence would probably be the man who would come along and say, "I saw him sell the whiskey."

Mr. TRAMUTOLO.—Then I will reserve an exception.

The COURT.—I rather agree with your idea, though, that they cannot split up one sale into twelve different transactions.

Mr. TRAMUTOLO.—There were only two sales made.

The COURT.—That is enough to support the proposition. The case will go to the jury under proper instructions. I don't think the Government makes anything by undertaking to split up one transaction into fifty, for instance.

Mr. HARDIE.—There are eleven counts, two counts charging maintaining a nuisance, five counts charging sales, two counts charging possession, and two counts charging furnishing. There are not twelve sales alleged, there are five sales alleged.

**Testimony of W. D. Smith, for Defendants (Recalled).**

W. D. SMITH, recalled by the defendants, testified:

I was in court when Mr. Shaen testified yester-

(Testimony of W. D. Smith.)

day. I heard his testimony as to having found the maraschino and the bottle of vermouth. I could not say which of the liquors that had been introduced by the Government were found by me. I was not there when the bottles were found. Somebody filled the bottles with the stuff in the pitcher, I did not see it done. I did not see the sealing. I do not know who did it.

**Testimony of Louis Cabiale, for Defendants.**

LOUIS CABIALE, called as a witness on behalf of the defendants and having been first duly sworn, testified:

I reside on the second floor of the premises at 1529 Stockton Street. The upstairs is used for a hotel and the lower floor is a restaurant. I am one of the proprietors of the Gianduja Restaurant. I have been in business there about five years. I am a married man of family. I have a record here that shows all the checks. The government wants that, on account of the war [50] tax. And it shows everything from some time in December to now; there are all the checks that have been used on my premises, so that we can check it up and see if I had that check on the 23d of July. The cash register has two rollers, one is out of order, and we never use it, because it does not work, it is out of order. Every night I check up all the waiters. Whenever I find any mistakes, I put those checks in that drawer, which we do not use for anything else. I have the record right here. Waiter

(Testimony of Louis Cabiale.)

No. 10 on July 22d was an extra waiter by the name of Harris. He did not have serial number 34. Seven waiters worked on the night of July 23d. None of these seven waiters have any base number 34. I have kept this particular record since some time in December 1919 up to last night. No waiter with serial number 34 worked in my premises since December 15, 1919. I have to keep the record; the Government wants you to keep a record of all the serial numbers of checks, on account of the war tax, that we pay in a cabaret; any place where there is any sort of entertainment we have to pay a war tax, and we have to keep a record of all the tags. I have my checks for the months of July and June, also, I have the tags right here. The checks here represent June and July. The receipts are inside showing that I paid the tax upon the checks totaled.

Mr. TRAMUTOLO.—I offer these as Defendants' Exhibit "A."

Mr. GEIS.—What is the purpose of introducing the other ones in June?

Mr. TRAMUTOLO.—Your contention is there is a public nuisance conducted there. We have records which could not be changed; the defendants are obliged to keep them, because the Government is entitled to a tax, and I think they should go to the jury for the purpose of showing that sales of liquor have not been promiscuously made. The Government has brought here some isolated checks, and I think that we are entitled to let the jury see

(Testimony of Louis Cabiale.)

these tags; they show the volume of business that is being done, and certainly they could be checked, if they desired to do so, by going through the voluminous number of checks, to see whether sales were promiscuously made.

The COURT.—I did not understand that there was an objection made to it. [51]

Mr. GEIS.—I make an exception to it on the ground that they are immaterial, irrelevant and incompetent in so far as applying to any other date except the date of July 22d and July 23d. It would probably take the Court and jury two weeks to run through this, and it is needlessly encumbering the record.

Mr. TRAMUTOLO.—You can go through them and check them and see if the Government has been paid.

The COURT.—The objection will be sustained. The witness may make any explanation he desires of these checks, but the introduction of the other checks is denied.

Mr. TRAMUTOLO.—I will accept that modification and not urge that the others go in.

Q. Did you look over the checks for the month of July, particularly the dates of the 23d and the 22d of July—did you look over those checks?

A. Yes.

Q. Is there anything on there showing or indicating the sale of intoxicating liquor?

Mr. GEIS.—We object to that on the ground it is not the best evidence.

(Testimony of Louis Cabiale.)

The COURT.—The objection will be sustained. It is apparent that if the defendant was violating the law that he would not be making a record of it which he must submit to a Government officer.

Mr. TRAMUTOLO.—Your Honor, it is a question of whether this man was deceiving the Government—

The COURT.—That is not the question we are trying. His own record, made out by him, could not be admissible.

Mr. TRAMUTOLO.—It is not made out by the defendant himself, but by the waiters.

The COURT.—Or by waiters who, if violating the law, would be just as guilty as he. You cannot disprove this charge by showing that no record has been made of it. He has an explanation of that check, he has said it might have been there, but you cannot show that liquor has not been sold there by showing that no record has been made there of sales of liquor.

Mr. TRAMUTOLO.—We note an exception. [52]

The WITNESS.—(Continuing.) I know Mr. Poultney. I have seen him several times with different officers that I know. I know several prohibition officers. I saw Mr. Poultney in my place of business on the night of Thursday, July 22d. I heard his testimony. Mr. Poultney came in and asked me to—he said he didn't know what to eat, and I said, "I will fix your dinner all right," and I took him to a table and sat him down in a private

(Testimony of Louis Cabiale.)

room, and I went into the kitchen and ordered a dinner. I did not serve him with any liquor. I did not order the waiter who waited on him to serve him any liquor. I do not know whether he was served with liquor that night. I don't remember who waited on him. The regular waiter that waited on the private rooms was gone at the time. Coppola is the regular waiter. He was not there that night. I was not present Friday night, the night of the raid. In the daytime I went across the bay and at night I went to the moving picture. We have French vermouth and Italian vermouth, which has been put up by a firm here known as nonalcoholic beverage, and we have sold it for nonbeverage purposes, because the label says it contains not more than 1/10 of 1 per cent of alcohol. Neither I nor anyone, to my knowledge, added any ingredients to increase the alcoholic content of that. I have other bottles of this kind, the same liquid. I brought one into court. The Government's Exhibit 4 for identification is maraschino. It is a sort of extract that we use for flavoring sabajon and some of the desserts that we make. Sabajon is made with eggs, stacked up with ice, and we put just a couple of drops in there to flavor it. It is not sold in my place for beverage purposes. (To the Court: The kitchen is about 25 feet from the bar.) I do not know of my own knowledge whether any sales of liquor were made in my premises by my employees on the nights of July 22d and July 23d. I knew Poultney prior to July 22d and knew

(Testimony of Louis Cabiale.)

what his occupation was. I have many times had trouble with patrons coming into my place with liquor. I have stopped dinner for that several times. I could produce the waiter that could testify to that. People have come in there and put wine or liquor right on the table. Of course, I could not go there and stop it, because I am not an officer, but I have gone to them and told them to get the liquor away, and if [53] they did not do it I would stop dinner, and I did it many a time. After their eating soup or salad I have stopped their dinner, and some of them I didn't even want to collect their checks. I said, "You don't pay anything, go out." Some objected to paying, saying that they had not finished the dinner, and that they wouldn't pay for the dinner, and I said, "Don't pay for the dinner, go out of my place." Some brought it in in their pocket; I don't know what they brought in; if they kept it in their pocket I could not go and search them. In fact, I am sure they brought it not only to my restaurant, but other restaurants. I know it by the fact that every morning, if you would go to any restaurant, you would find some empty bottles under the tables, in every place in town. I have been at that restaurant five years. My lease has about six years to run. I have been endeavoring to dispose of my place but I have been unable to find a purchaser. I pay $510 a month rent. Since the trial of this case I have made an investigation with reference

(Testimony of Louis Cabiale.)

to the grape juice that I have bought, as to its turning into wine.

I asked some experts about that question, if it was possible that in a short time the grape juice would turn into wine. So I was told that the grape juice would not only exposed to air, but sometimes being in an average temperature room like this room, here, it can turn into wine. So I have taken it all away from my premises. I have put some into vinegar barrels to make some vinegar out of it. I know that from now on that they have a new process of keeping grape juice, and I hope in the future I will be able to get grape juice without running the risk of its turning into wine. But so far as the last four or five months has been concerned, it has been very difficult to keep it. In fact, in all the new barrels that they put grape juice in they have to put some paraffine in, because they have found out that the pore, itself, that is, the wood, the air goes through it, and the grape juice turns into wine—only from the air that comes into it. They have proved that, and you can ask any dealer in grape juice, and they are putting some paraffine in every barrel. The other owners of the premises are Donizelli and Majori; the latter is in Italy. [54]

On cross-examination, the witness testified: I never met Mr. Poultney, but I saw him with some prohibition officers in this court. I came to court several times on cases. I did not come here to see who the prohibition officers were because I

(Testimony of Louis Cabiale.)

know them pretty near all. I know all the agents that have been with the revenue office for a long time. I used to go, years ago, to the revenue office to purchase stamps for wine and pay the war tax. In fact, I have known Jordan for years and I have known Shaen for years. I saw Poultney in court with some of the revenue officers that I know. I don't remember what other prohibition officers I saw him with. This book before me shows that on July 22d and July 23d there was no check of that serial number that was found in the cash register. This column of figures represents the serial number on which they began work. On July 21 waiter No 1 begins with serial number 274, and so on. This number here on the left-hand margin is the number of the waiter. On the 22d we had a waiter No. 10. On the 23d I had only seven waiters. I remember Mr. Poultney coming into my place on the 22d with a lady. He told me to order dinner for him. Generally I do not take orders but the waiter takes them. He told me to fix up a dinner for him, so I did. He did not say what I should order for him, or anything like that, so I started in ordering for him. He gave no specific order, except a general order that he wanted dinner. I went into the kitchen and ordered some salad and some meat and some pastry; I don't remember exactly what I ordered; I remember it was a combination salad and some meat. I gave the order to the waiter. I did not write it out. I told the waiter to write it out. I did not go back to

(Testimony of Louis Cabiale.)

the table at all. I have no checks which the result of the meal. If he ate in the public dining-room I would have the check, because we keep all the checks of the dining-room for the war tax, but in boxes they are not subject to the war tax, so we just throw them away. We had no liquor on the premises. We have grape juice, and apple cider, and Manhattan and Martini cocktails, vermouth—all this stuff that they put up now, nonalcoholic drinks. We serve grape juice from the bar in a pitcher. We do not serve any beverage from any other place in the building. [55]

**Testimony of Frank Coppola, for Defendants.**

FRANK COPPOLA, called as a witness on behalf of the defendants and having been first duly sworn, testified:

I am the defendant mentioned in the information as Colai. I have been employed nearly eight years at the Gianduja Restaurant. I am a waiter. On Thursday, July 22d, I quit about half-past seven or eight o'clock. I did not serve liquor to Mr. Poultney or any other person in the restaurant. I work on the Union Street entrance.

On cross-examination, the witness testified:

I did not serve Mr. Poultney with anything. I was there the night of the raid. I am not the waiter that tipped over whatever I had on my tray at the time. I never saw Mr. Poultney at all.

**Testimony of Peter Zurich, for Defendants.**

PETER ZURICH, called as a witness on behalf of the defendants and having been first duly sworn, testified:

I have been working as a waiter at the Gianduja Restaurant about three months. I *was the* night of July 23d, the night of the raid. I did not serve any liquor to Mr. Poultney, or to any other revenue officers that night. I did not have any liquor in my possession, carrying it on a tray. No tray was knocked out of my hand.

On cross-examination, the said witness testified:

I start in about five and I work until about 12 or 1. Sometimes I go home early. The restaurant is open in the morning, I think either 11 or 12 o'clock. On that night I waited on the people if they sat at my table. I served grape juice. I served whatever was in the pitcher, for that they charged 25 cents and during the cabaret 50 cents. By 'cabaret' I mean while the girls were dancing for the amusement of the patrons.

On redirect examination, the said witness testified:

The owners do not employ dancing people. The people dance. There are a couple of musicians and a singer, I think.

On recross-examination, the said witness testified:

Sometimes they have a man or woman singing. There is one piano and one banjo, and a fellow that plays a xylophone; about three musicians. [56]

**Testimony of Dante Forasiepi, for Defendants.**

DANTE FORASIEPI, called as a witness on behalf of the defendants and having been first duly sworn, testified:

I am a waiter at the Gianduja Restaurant and have been working there three years. I'm an Italian by nationality. I was present on the night of July 23d, the night of the raid. I saw Mr. Poultney that night. I did not serve him with any liquor. I did not have any liquor in my possession that night, never; not before or after.

On cross-examination, the witness testified:

I was there during all the evening of July 23d, up till the time the raid was made. I served the patrons that night with the beverage that was in the pitcher behind the bar. I made a charge of 25 cents a glass. When the dance was in progress the beverage that was in the pitcher was 50 cents. The dancing usually began about half-past eight or thereabouts. I do not know precisely the exact hour; it depended on the crowd that was there. I am the man that the prohibition agents allowed to go home that night. I simply was found with that empty glass in my possession with nonalcoholic beverage in it. On that evening I did not go into some portion of that building and declare to the persons present that there were revenue officers there. I didn't say anything, because they didn't allow me to even get out—they would not even allow me to go and collect money. One of these, because I was glancing over the glass door, just hit

(Testimony of Dante Forasiepi.)

me over the shoulder, and I was sore for two days. I was so confused that I did not say anything. They did not give me a chance even to leave. I said nothing to nobody.

**Testimony of Peter Gabalio, for Defendants.**

PETER GABALIO, called as a witness on behalf of the defendants and having been first duly sworn, testified:

I have been employed in the Gianduja Restaurant over a year. I am a floor-walker, seating the people down. I was in the place the night of July 23d. I was on my way out when they came in. I did not see the raid. I never served any liquor there in the restaurant at all. I just seat the people. I was in the restaurant Thursday night, July 22d. I didn't see Mr. Poultney at all. I have had difficulty many times with patrons bringing liquor into the restaurant. Mr. Donizello is in charge of the cash register. Frank [57] Coppola works on the Union Street side; he does not work in the main dining-room at all and has not worked there since I became floor manager. The dance hall has been in the Gianduja Restaurant about a year and a half, and we have had an orchestra and a singer there for about the same time.

On Cross-examination, the said witness testified:

On that evening I was there until about half past ten. I went there at five o'clock. I was on my way out when the people was coming in, so I didn't stop. I never serve the patrons, I just seat them down,

(Testimony of Peter Gabalio.)

that is all. I never take any orders. I simply send a waiter to them. I know that they always serve some grape juice out of the pitcher from the bar. We had it there always. We charge 25 cents a glass. We charge 50 cents for the cocktails. The mixture that I call cocktails was served every night.

**Testimony of Andrew Donizello, for Defendants.**

ANDREW DONIZELLO called as a witness on behalf of the defendants, and having been first duly sworn, testified:

I have lived in the city and county of San Francisco 27 or 28 years. I am a married man with three children. I am one of the owners of the Gianduja Restaurant. I was in the restaurant Friday evening, July 23d. I was dressed like I am now. Never in my life did I wear a waiter's suit. I was taking care of the cash register. Mr. Kupser, the prohibition enforcement officer was by me by the cash register all evening. I saw the checks that were taken out of the cash register. I handed them to Mr. Kupser, I handed him several checks. I believe there were 21 or 22 checks there. It is a National Cash Register, double rollers—two drawers, A and B. The tags were in the B drawer. No. 10 waiter with serial number 36 or 34 did not work that night, and waiter No. 10 did not work July 22d. These checks were there a long time, because there are mistakes even on the part of the Government, the revenue, that we have to pay; sometimes there is a mistake of them, or a mistake in the house, where

(Testimony of Andrew Donizello.)

the waiter don't charge right, and we put them away and correct them with the waiter when he comes back the next day. On Sunday and Saturday we do more than twice as much business as other times, and we have waiters come in, extra men, and they [58] do not come back, and we keep the checks. If there is anything wrong, when the Government comes up, we have to have the checks, so as to explain by the checks. These checks we have a long time, and that is where we keep them, in the drawer that we do not use. This check don't belong to this year, it might be a year old, I don't know how old it is. I am positive it is not a check that could have been used on July 22d or 23d because I can tell by the number, by the way it runs. I think I have been connected with the Gianduja Restaurant about five years. I have been trying to dispose of the place for several months but we have no buyers. I never served any liquor during five years. I did not authorize any of my employees to serve any liquor to Mr. Poultney or to any other individual. I am on the cash register and taking money in. I know some waiters have come to me and said that some of their patrons there have got a bottle on the table, and sometimes I am busy with the cash and have not time, and I call my man and tell him to go over there and see if they have got any liquor, and if they have, to take the liquor away, because we are not allowed to keep it. Sometimes I go myself, if I can get time, but it is a long ways, sometimes, from the cash register, and sometimes I can't do it; but

(Testimony of Andrew Donizello.)

if I can't do it I have the waiter go to the table and ask them to take the liquor away. Sometimes we will find in the morning empty bottles. About a week ago I found a flask about half full of sherry wine under the table. It was by the end of the table, and when the man swept in the morning, like you would do here, that is what he found, he said, and some other times we have found other bottles with some other stuff in; many times we have trouble in that way; we do not want them to bring it in.

On cross-examination, the said witness testified:

As proprietor I have supervision of the service that is made to patrons. When I have time I go through the dining-room and various places to see that patrons are served. I know what patrons receive by way of service in my restaurant. Whatever may be served is served with my knowledge and authority. I can't remember the day that the check, that was handed to me by Mr. Tramutolo, was made out, because [59] it is an old check. I can't tell you the exact date. I could not say how old it is because we have got numbers since then; the book will tell; we can find the serial number and the number of the waiter. I could not estimate the date.

**Testimony of G. Bertolotti, for Defendants.**

G. BERTOLOTTI, called as a witness on behalf of the defendants and having been first duly sworn, testified:

I have lived in San Francisco about ten years and have worked at the Gianduja Restaurant about

(Testimony of G. Bertolotti.)

four months. I was there the night of July 23d, when the place was raided. I was outside of the counter. I was serving as a waiter. The bottle shown me contains maraschino. It is used in the kitchen in order to flavor sabajon. I saw that bottle there that night. It is nonalcoholic and it is on the market and sold in every place. I never saw the four bottles. We just had a pitcher full of grape juice. We did not have any brandy behind the bar, or any whiskey. We did not have any wine; I had grape juice and these two bottles. The grape juice was in the pitcher on the bar inside. On the night of the raid I did not serve any wine to any body, nor did I serve it on Thursday night, July 22d. These Manhattans or Martinis are not made of alcohol. The liquor served to patrons on the evenings of July 22d and 23d was nonalcoholic.

**Testimony of Attilio Porcellini, for Defendants.**

ATTILIO PORCELLINI, called as a witness for the defendants and having been first duly sworn, testified:

I have been employed at the Gianduja Restaurant for three and one-half months. I was there the night of July 23d. I was seized by three or four officers that night. When I was seized I had three or four glasses, one of Bevo Beer, one of lemonade, and one of grape juice, and I don't remember the other. I did not throw the contents of that tray away purposely. Someone stopped me, and they caused me to spill the tray. At the

(Testimony of Attilio Porcellini.)
time there were about 150 people in the restaurant. Three or four officers seized me. I did not have any wine on that tray, as testified to by Agent Jordan. [60]

On cross-examination, the said witness testified:

My position that night was that of a waiter. When beverages of any kind were served I collected and brought it to the cash register. It goes into the till of the proprietors. When I came in with the tray nobody spoke to me; they got hold of me and grabbed me and took me away. I don't know Mr. Jordan, but three or four of them grabbed me all at once. I had the tray in this fashion, and they came in, three or four, and one got hold of me by the arm and he said, "You are under arrest," and by doing that the tray upset and the glasses fell. I have never been arrested before, this is the first time.

**Testimony of Guido Battaglia, for Defendants.**

GUIDO BATTAGLIA, called as a witness on behalf of the defendants, and having been first duly sworn, testified:

I am assistant cashier in the Banca Popolare Fugazi. I have known the defendant Cabiale for about five years. I always know him for a good man, good morality, an honest man. I know Mr. Donizello and Mr. Gabalio and the defendant Forasiepi. I know all of them as good men, honest at all times; I never heard anything against them.

(Testimony of Guido Battaglia.)

On cross-examination, the said witness testified:

I heard about them a month ago, when they were arrested in the case, but before that I never heard anything against them. I never heard anything against their reputation. They keep a commercial account at my bank. I have been to the Gianduja Restaurant several times. Sometimes I go over there for lunch and sometimes for supper. Everybody in San Francisco who knows Cabiale has nothing to say against him.

**Testimony of Alberto Cesana, for Defendants.**

ALBERTO CESANA, called as a witness on behalf of the defendants, testified:

I am a newspaper correspondent for the "Italia La Voce," an Italian newspaper. I know Cabiale, Donizello, Gabalio, Zurich and the rest of them. I know their general reputation for truth, honesty and integrity; from all I know they all have a good reputation. [61]

On cross-examination, the said witness testified:

I never heard of their being arrested for violations of the National Prohibition Act. I go to the Gianduja Restaurant often, about every night. The word "Gianduja" means a mask. In Italy every province is represented by a figure.

**Testimony of E. M. Ratto, for Defendants.**

E. M. RATTO, called as a witness on behalf of the defendants, and having been first duly sworn, testified:

I am fifty years of age and am by profession an

(Testimony of E. M. Ratto.)

interpreter. I know all of the defendants with the exception of Zurich and know their general reputation for truth, honesty and integrity. That reputation is good.

On cross-examination, the said witness testified:

I have sometimes visited the Gianduja Restaurant in the daytime for lunch; never in the evening because I never go to a cabaret.

THEREUPON counsel for the defendants renewed the motion previously made for the introduction in evidence of the tags of July 22d and 23d and upon this motion the following proceedings were had.

Mr. TRAMUTOLO.—If your Honor please, that practically concludes the case so far as the defendants are concerned; I still would like to renew my motion for the introduction of certain tags of July 22d and 23d, upon this theory, that if liquor was sold promiscuously on that day there would be entries on these tags; these tags, as I stated to you this morning, must be kept, by reason of the fact that the Government is entitled to a tax, and having the Government's receipt, there can be no inaccuracy upon the tags for the entire month. Now, if the theory of the Government is that liquor was promiscuously sold, every one of these tags would have to be changed in the meantime.

The COURT.—Not at all. Let us assume, I do not say this except as an assumption, that the contents of that pitcher was wine. Now, if somebody orders the wine, and they go to the pitcher and

bring it out. I suppose on the tags it would appear as grape juice. Other men order cocktails, and on the tags it would appear as cocktails. You cannot tell from the tags what the alcoholic content of the article is. You are undertaking to show by the fact [62] that these things were not registered there is no violation of the law. This is simply encumbering the record without proving anything.

Mr. TRAMUTOLO.—The point I want to make is, why should they be permitted to take isolated tags and we not be able to produce all of the tags?

The COURT.—They have produced tags that show the sale of liquor, and to counteract that you want to offer these tags that on their face do not show the sale of liquor.

Mr. TRAMUTOLO.—In other words, I want to introduce all the tags for those two days.

The COURT.—The motion will be denied.

Mr. TRAMUTOLO.—To which we reserve an exception.

**Testimony of George R. Poultney, for the Government (Recalled in Rebuttal.)**

GEORGE R. POULTNEY, recalled for the United States in rebuttal, testified:

Neither I nor anyone that was with me took any alcoholic liquor into the Gianduja Restaurant either on the 22d or 23d of July. Whatever liquor I secured there was secured from the inside, under my orders, as I have previously testified.

**Testimony of W. Smith, for the Government (Recalled in Rebuttal).**

W. SMITH, recalled for the United States in rebuttal, testified:

At the time I apprehended the defendant Forasiepi there was just one glass that was about a quarter full of wine.

On cross-examination, the said witness testified:

I smelled it, put it on my hand and put it to my lips. Forasiepi came thru the door into the bar where I was. He had a glass in his hand, just a glass. I put it with the other on the drainboard behind the bar and we left it there. I did not see it poured into any one of these bottles which have been produced here as exhibits. (To the Court: I testified that I jumped over the counter and found the pitcher of wine.) I did not testify that I poured the contents of that pitcher into any bottle. I do not know who did. I was not there at all times, as I said before. I left and ran after a man who was running through a door, and failed to overtake him. [63]

**Testimony of H. C. Drew, for the Government (Recalled in Rebuttal).**

H. C. DREW, recalled for the United States in rebuttal, testified:

I know what Maraschino is. I handled it some eleven or twelve years ago. It is used for beverage purposes.

(Testimony of H. C. Drew.)

On cross-examination, the said witness testified:

I know what sabajon is. I have always been given to understand that sherry was the liquor used for flavoring. I know that maraschino is a beverage, or a cordial, and has been used as such in cabarets and saloons for years.

**Testimony of W. J. Jordan, for the Government (Recalled in Rebuttal).**

W. J. JORDAN, recalled for the United States in rebuttal, testified: I was all alone at the time the liquor on the tray was upset. Prior to the time of the upsetting of the liquor I did not place my hand upon a waiter at all. I asked him what he had there, and he wanted to know who I was, and I showed him my badge, and said I was a revenue officer, and he took it and threw it up in the air and said it was grape juice. There was not any other kind of liquor in any of these glasses except what I have termed to be wine. There might be six glasses at the most, and they all contained red liquor in them; there was no beer, or lemonade, or anything at all.

THEREUPON both sides rested.

THEREUPON the said cause was argued by counsel, and the Court delivered its charge to the jury, as follows, to wit:

"Gentlemen, this is the first case that we have tried together; as you will be here for the term, it will probably not be the last. So, aside from the merits of this particular case, there are a few gen-

eral considerations that I would like to bring to the minds of the jury. The first is, of course, that the jury are the sole judges of the facts. With the province of the jury in that regard the Court is not disposed to interfere.

The next proposition is that the duty of the Court is to see that the facts are placed before the jury in accordance with the law, and to state to them the legal principles involved, which the jury will themselves apply to the facts as they find them to be.

We have here a number of defendants charged with a violation of the National Prohibition Law. Now, I need not say to you that whatever the sentiment [64] is for or against the enforcement of this Prohibition Law, that is a matter with which you and I are not concerned. Your duty, equally with mine, under your oaths, and my oath, is to administer the law as we find it, whether we agree with the principle or purpose of it, or not. We have in this court, awaiting trial some 200 or 300 defendants charged under this law. Whether these men are guilty or innocent will be determined by each jury as the facts are presented to them. The acquittal of a man who is guilty of any charge simply encourages other men to go out and commit a similar offense. No law can be enforced without the assistance of the jury, who have the final say in all criminal cases. Now, if juries are going to acquit men who are guilty, the result will be that we will never get through. Unfortunately, this is the only court in this District, extending from the

county of Monterey to the Oregon line, and from the Pacific Ocean to Nevada, upon which the enforcement of this law falls, and without the assistance of the jury we cannot enforce it at all. I say this not to influence you in passing upon this case, or any subsequent one, but to impress upon your minds that in dealing with these matters you are dealing with a very important subject. We are dealing with a law that has been adopted by a majority, we must abide by it and attempt to enforce it until such time, if that time ever comes, that the law may be changed. It is also true that men who violate this law do it because they make money out of it. There is no question of any principle involved in so far as they are concerned. When they violate the law, they violate it because they can make money by so doing. Now, I think this court has been quite vigilant in protecting the rights of citizens and individuals from the sometimes over-zealous acts of officers in the enforcement of this law, but the Court will be equally vigilant in upholding the officers in acts where they are acting within the law. There can be no question of the legality of the actions of the officers in the present case.

Now, that brings us to a consideration of the case itself. The defendants here are charged in a number of counts with a violation of this law.

The first count charges that they, upon the 22d of July, 1920, did maintain a common nuisance at 1549 Stockton Street, in the Gianduja hotel, restaurant, café and bar, in that they kept on hand there

unlawfully certain intoxicating liquor, [65] to wit, claret wine, containing one-half of 1 per cent or more of alcohol by volume and which was then fit for beverage purposes.

The second count charges a violation of the provisions of the act in that they had unlawfully in their possession at that same time and place certain claret wine.

The third count charges a violation of another provision of the act, in that at the same time and place they sold certain intoxicating liquor, to wit, claret wine.

The fourth count also charges at the same time and place a violation of the act in the sale of claret wine.

The fifth count also charges a violation of the act in the sale of intoxicating liquor, to wit, claret wine.

The sixth count charges also a violation of the act in the sale of intoxicating liquor, to wit, claret wine.

Now, the seventh count charges that on the 23d day of July, or the following day, at the same time and place, there was maintained a nuisance by keeping on the premises claret wine, jackass brandy, vermouth and maraschino, containing one-half of 1 per cent or more of alcohol by volume, and that the keeping of the liquor there on the place was unlawful.

The eighth count charges that they did unlawfully keep at the same time and place the same articles, claret wine, jackass brandy, vermouth and maraschino.

The ninth count charges that on the 23d day of July, at the same place, they unlawfully, wilfully and knowingly furnished to George Poultney and C. W. Herbert certain intoxicating liquor, to wit, claret wine.

The tenth count charges that they furnished to Poultney and Herbert certain intoxicating liquors, to wit, cocktails.

The eleventh count charges on the same day the sale of certain intoxicating liquor, whiskey. Now, I do not recall any evidence introduced as to the sale of whiskey upon that occasion, so that the eleventh count will be withdrawn from your consideration. [66]

Now, bearing upon these various charges we have certain provisions of the Prohibition Act, which I will call to your attention.

"The word 'liquor' or the phrase 'intoxicating liquor' shall be construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter, and wine and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per cent or more of alcohol by volume which are fit for use for beverage purposes."

Section 21 provides that: "Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a com-

mon nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor, and upon conviction'' shall be punished as therein provided.

Section 33 provides:

"After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be *prima facie* evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title. Every person legally permitted under this title to have liquor shall report to the commissioner within ten days after the date when the eighteenth amendment of the Constitution of the United States goes into effect, the kind and amount of intoxicating liquors in his possession.''

Section 3 provides:

"No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect''—that was in January of the present year—"manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this act, and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.'' [67]

A sale, of course, is the transfer of personal property or title to personal property from one to another for a consideration, and, of course, the validity of that sale does not depend upon payment by the

purchaser immediately, or at any time, if the title is transferred at the time, he is entitled to collect at that time, or later, as he may be able to do. I make this suggestion in response to a suggestion of counsel that these liquors, if sold, were never paid for. That is, of course, immaterial. If they were delivered for a price, they were sold at the time, and it is not a question of the parties refusing to pay for them. Nor is it any defense to an action to say that the vermouth, for instance, that was found there, and which the chemist says contains 2.55 per cent, was purchased from somebody with the understanding that it contained a less per cent. The contents must be determined, not from the label, but by the contents themselves. Every man who is dealing with liquor of any kind, therefore, is bound upon his own responsibility to keep within the law. If it is found in his possession at an unlawful time or an unlawful place, he cannot say that he did not know that it contained one-half of 1 per cent or more of alcohol. It is his duty to know what it contains, otherwise, he violates the law.

It has also been suggested that maraschino is used for flavoring and cooking. That may be true, but the question here is not what it was used for, but whether it was fit for beverage purposes. The language of the act is "any spirituous, vinous, malt or fermented liquor, liquids and compounds, containing one-half of 1 per centum or more of alcohol by volume, which are fit for use for beverage purposes." If this maraschino was fit for use for beverage purposes and it was there in the bar room, not having

been reported, or not having been authorized to be kept there by the revenue officers, of course, it was there unlawfully, even though it might have been used for cooking purposes.

Speaking, now, from the side of the testimony presented by the Government, we have the presence in that establishment at that time of whiskey, brandy, wine, vermouth, maraschino and cocktails. Now, these liquors, if found there, as testified to by the officers and containing the contents that have been specified were there unlawfully. There is no authority for keeping them there, and the [68] burden is upon the party who has them there, as the statute says, to show that they were there lawfully. The question, therefore, for the jury to determine, is whether these liquors were there at that time, and, if so, who was responsible for their presence.

We have here eight defendants charged. Cabiale and Donizello are the proprietors. Gabalio is a floor walker, who seats the people. Bertolotti, I think, was the man who was designated as the bartender. The rest, I think are waiters. Now, there is this provision of the criminal law, which is as follows:

"Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal."

So that we have this situation: If the jury do find that the law was being violated there, if the two proprietors and the others who were employed there were aiding, and inducing, and encouraging one an-

other in the violation of the law, they are all equally guilty.

It is for the jury to determine whether any of these defendants are guilty. If so, which of them, and how many. In passing upon that question you will bear in mind the testimony presented both by the Government and by the defendants, and also this provision of the law that makes every one a principal who aids, abets, counsels, commands, induces or procures the commission of any offense against the law.

The defendants in this case, as in any case upon trial in this court for a criminal offense are presumed to be innocent, and that assumption attaches at the commencement of the trial and remains with them until the jury have determined otherwise by their verdict, if they so determine. The jury should not so determine unless they are satisfied by the evidence of the guilt of the defendants beyond a reasonable doubt.

A reasonable doubt is not every capricious or imaginary doubt that may arise out of sympathy of the jurors. It is such a doubt as a reasonable man may honestly entertain upon a full consideration of all the evidence. It is defined in law [69] to be that state of the case which, after an entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they can not say that they have an abiding conviction to a moral certainty of the truth of the charge. If you have such a reasonable doubt as to the guilt of these defendants, or any of them, it is your duty to give to such defendant the benefit of that doubt and acquit

him. If you have no such reasonable doubt, it is equally your duty to convict him.

Evidence has been introduced here tending to show that the reputation of these defendants, or some of them, for truth, honesty and integrity is good. That evidence you will consider with all the other evidence in this case, and if after a consideration of all the evidence, including that of good reputation, you have any reasonable doubt of the guilt of such defendant, you will, as I say, give him the benefit of that doubt and acquit him. On the other hand, if, after a consideration of all of the evidence, including that of good reputation, you have no reasonable doubt of his guilt, it is equally your duty to convict him notwithstanding such good reputation.

Now, you may return, if the evidence satisfies you as to the guilt of all of the defendants upon all the counts, a general verdict of guilty; that is, a conviction of all the defendants upon all the counts. If, on the other hand, you have a reasonable doubt as to the guilt of all the defendants upon all the counts, you may return a general verdict of not guilty; or, you can return a verdict finding certain defendants guilty and others not guilty, as the evidence shall appeal to you, upon the whole case, or upon any count.

You may take the information to the jury room with you. The clerk has prepared one form of verdict which you may use, or you may prepare your own verdict. [70]

The defendant requested the Court to give the following instructions:

"You are further instructed that the provisions of

the National Prohibition Act are to be liberally construed to the end that the use of intoxicating liquors as a beverage can be prevented; therefore, it must be proven to your satisfaction beyond a reasonable doubt and to a moral certainty that the liquor or liquors found on the premises were for the purpose of being sold as a beverage. (Section 3, Title 2, Act October 28, 1919).

"You are instructed that where a sale is alleged to have been made by an employee it must be proven to your satisfaction beyond a reasonable doubt and to a moral certainty that a benefit resulted to the employer by reason of the sale made by an employee; therefore, before you can convict the defendants at bar, or any of them, it must be proven to your satisfaction beyond a reasonable doubt and to a moral certainty which of the defendants derived the benefits of the sale or sales alleged to have been made."

The Court refused to give the said requested instructions, to which refusal counsel for the defendants duly excepted.

THEREUPON, to wit, on the twenty-first day of September, 1920, the jury retired and subsequently returned into court with a verdict finding the defendant Cabaile guilty on counts 2, 3 and 8 of the information and not guilty on the remaining counts; finding the defendant Donizello guilty on counts 2, 3, 8, 9 and 10 of said information and not guilty on the remaining counts; and finding all of the other defendants not guilty on all of the counts of the information.

THEREAFTER and on the sixth day of October, 1920, the day fixed for the pronouncement of judgment the defendants Cabiale and Donizello were called to the bar and asked if they had any legal cause to show why the judgment of the law and the sentence of the Court should not be pronounced upon them.

THEREUPON Chauncey F. Tramutolo, Esq., counsel for the said defendants presented to the Court and filed his motion for a new trial, which said motion is in the words and figures as follows, to wit: [71]

(Title of Court and Cause.)

**Motion for New Trial.**

Now comes the defendants Louis Cabiale and Andrew Donizello and move the above-entitled court to set aside and vacate the verdict heretofore rendered herein on the following grounds:

I.

That the said verdict is against the law.

II.

That the said verdict is against the evidence.

III.

That the said verdict is not supported by the evidence.

IV.

That the Court erred in refusing to give the instructions requested by the defendants, which instructions are as follows:

(a) 'You are further instructed that the provi-

sions of the National Prohibition Act are to be liberally construed to the end that the use of intoxicating liquors as a beverage can be prevented; therefore, it must be proven to your satisfaction beyond a reasonable doubt and to a moral certainty that the liquor or liquors found on the premises were for the purpose of being sold as a beverage. (Section 3, Title 2, Act October 28, 1919).'

(b) 'You are instructed that where a sale is alleged to have been made by an employee it must be proven to your satisfaction beyond a reasonable doubt and to a moral certainty that a benefit resulted to the employer by reason of the sale made by an employee; therefore, before you can convict the defendants at bar, or any of them, it must be proven to your satisfaction beyond a reasonable doubt and to a moral certainty which of the defendants derived the benefits of the sale or sales alleged to have been made.'

V.

Upon newly discovered evidence, which evidence is hereto attached and made a part of this motion in the form of an affidavit of S. V. Thomas, and which evidence defendants could not, with reasonable diligence, discover and produce at the time of trial.

C. F. TRAMUTOLO,

Attorney for Defendants and Plaintiffs in Error.

[72]

With the said motion and in support thereof the said counsel for said defendants presented and filed the following affidavit:

(Title of Court and Cause.)

**Affidavit of S. V. Thomas.**

State of California,
City and County of San Francisco,—ss.

S. V. Thomas, being first duly sworn, deposes and says:

That on and prior to the 23d day of July, 1920, he was employed by the United States Government as a prohibition enforcement officer charged with the duty of suppressing violations of the act of October 28, 1919, more commonly known as "The National Prohibition Act."

That your affiant on the 23d day of July, 1920 between the hours of 9:30 and 10:30 P. M., of said day in company with other prohibition officers entered the barroom premises of the Gianduja Hotel and Restaurant situated at 1549 Stockton Street in the City and County of San Francisco, State of California; that accompanying your affiant were prohibition enforcement officers R. A. Wolf and W. D. Smith; that your affiant personally searched the barroom premises of the Gianduja Hotel and Restaurant and on said premises found a bottle of vermouth and a bottle of an unknown liquid which affiant afterward ascertained to be mareschino; that on the drainboard of the bar of said premises, affiant found a pitcher containing an unknown liquid, a part of which liquid affiant poured into two empty Vichy Water bottles; that all of the property found in and about the barroom premises of said Gianduja Hotel and Restaurant was found by your affiant; that your

affiant after entering the said premises, at all times observed W. D. Smith guarding the door leading into the barroom premises, which said door is situate at the corner of Stockton and Union Streets, and that said W. D. Smith remained near said door for the purpose of preventing people from going out or coming into the barroom premises during the time that your affiant was searching the barroom premises; that your affiant was in a position to have seen W. D. Smith search the barroom premises if the said W. D. Smith had ever attempted to search the same.

That in two of the bottles labeled Vichy Water your affiant poured [73] therein certain liquids which liquids were brought in from the dining room of the Gianduja Hotel and Restaurant and that it is untrue with respect to these two bottles, that the same were found in or about the barroom premises.

That affiant further states that any and all property found by him on the barroom premises of the Gianduja Hotel and Restaurant were placed by him in a wooden box and that said wooden box containing the liquids so found, was taken to the prohibition enforcement office in the Appraiser's Building in the City and County of San Francisco; that the Government, in its information charged the above named defendants with having had in their possession a quantity of jackass brandy. With respect to this jackass brandy, affiant states that the said jackass brandy was not at any time or at all found in or about the premises of the Gianduja Hotel and Restaurant or barroom premises but that the said jackass brandy was on the person of your affiant at the time

of entering the barroom premises of the Gianduja Hotel and Restaurant and that affiant had procured said jackass brandy from another place which affiant had searched prior to going to the premises of the the Gianduja Hotel and Restaurant and that affiant inadvertently placed said jackass brandy amongst the property alleged to have been found on the premises of the Gianduja Hotel and Restaurant and barroom premises; that on one of the trial days of the above-entitled case, to wit, on September the 22d, 1920, affiant was interrogated in the presence of his wife by Assistant U. S. Attorney A. M. Hardie with respect to the testimony he would give when called as a witness for the Government; that in said interview with Assistant U. S. Attorney A. M. Hardie, your affiant stated that his testimony would be in substance as hereinabove stated in this affidavit; that thereafter Assistant U. S. Attorney A. M. Hardie requested affiant to go to the office of Assistant U. S. Attorney B. F. Geis in the Postoffice Building, with which request your affiant complied and in the conversation had with the Assistant U. S. Attorney B. F. Geis, affiant related the same conversation as affiant had with Assistant U. S. Attorney A. M. Hardie, which conversation was in substance as stated in this affidavit and that then and there the said Assistant U. S. Attorney B. P. Geis told affiant that he (Geis) would not [74] use affiant as a witness.

S. V. THOMAS.

Subscribed and sworn to before me this 2d day of October, 1920.

[Seal] ETTA LAIDLAW,

Notary Public in and for the City and County of San Francisco, State of California.

---

AT THE SAME TIME, the said counsel for said defendants presented and filed his motion in arrest of judgment, which said motion is in words and figures as follows, to wit:

(Title of Court and Cause.)

**Motion in Arrest of Judgment.**

Now comes the defendants Louis Cabiale and Andrew Donizello and each of them and move to arrest the judgment herein upon the following grounds, to wit:

I.

That the said information fails to state an offense against the laws of the United States of America.

II.

That the said information fails to state an offense against the laws of the United States in this; that it appears upon the face of said information that this Court has no jurisdiction of the offense which these defendants and each of them are charged with having committed.

III.

That there is no authority in law for the filing of information for the violation of the law which the defendants and each of them are charged with having violated.

Dated: This 6th day of October, 1920.

C. F. TRAMUTOLO,

Attorney for Defendants and Plaintiffs in Error.

[75]

THEREUPON, the motions for new trial and in arrest of judgment were argued by counsel, in consideration whereof, it was ordered by the Court that said motions and each of them be denied, to which rulings of the Court, counsel for the said defendants, then and there duly excepted. And the Court thereupon passed sentence upon the said defendants as appears from the judgment of record herein.

And now and within due and legal time thereafter, the said defendants Louis Cabiale and Andrew Donizello, present this their Bill of Exceptions to be used upon the prosecution of the writ of error in this cause and pray that the same be settled, approved and allowed.

Dated: This —— day of October, 1920.

CHAUNCEY F. TRAMUTOLO,

Attorney for said Defendants.

It is hereby stipulated that the foregoing bill of exceptions is in all respects full, true and correct and as such may be settled by the trial judge, and that same shall be and constitute the bill of exceptions in said cause.

FRANK M. SILVA,

United States Attorney.

By ALBERT M. HARDIE,

Assistant United States Attorney.

To the end that the matters and things therein contained may be and remain of record, the foregoing

bill of exceptions is hereby settled, approved and allowed as being in all respects full, true and correct.

M. T. DOOLING,
District Judge.

[Endorsed]: Rec'd a copy of the within bill of exceptions this 1st day of November, 1920.

FRANK M. SILVA,
U. S. Attorney.
ALBERT M. HARDIE,
Asst. U. S. Attorney.

Filed Apr. 6, 1921. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [76]

---

In the District Court of the United States for the Northern Division of the Northern District of California.

No. 8602.

THE UNITED STATES OF AMERICA

vs.

LOUIS CABIALE et al.

**Verdict.**

We, the Jury find as to the defendants at the bar, as follows:

Louis Cabiale, Guilty on Counts 2, 3, 8. Not Guilty on Counts 1, 4, 5, 6, 7.

Andrew Donizello, Guilty on Counts 2, 3, 8, 9, 10. Not Guilty on Counts 1, 4, 5, 6, 7.

P. Cavello, Head Waiter, Not Guilty on all Counts.

G. Bertolotti, Bartender, Not Guilty on all Counts.
Peter Zurich, Not Guilty on all Counts.
Attilio Parcellini, Not Guilty on all Counts.
Dante Forasiepi, Not Guilty on all Counts.
Frank Coppola, Not Guilty on all Counts.

WM. R. PENTZ,
Foreman.

[Endorsed]: Filed Sep. 22, 1920, at 6:20 o'clock P. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [77]

---

In the Southern Division of the United States District Court, Northern District of California, First Division.

No. 8602.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LOUIS CABIALE et al.,
Defendants.

**Motion for New Trial.**

Now comes the defendants Louis Cabiale and Andrew Donizello and move the above-entitled Court to set aside and vacate the verdict heretofore rendered herein, on the following grounds:

I.

That the said verdict is against the law.

II.

That the said verdict is against the evidence.

III.

That the said verdict is not supported by the evidence.

IV.

That the Court erred in refusing to give the instructions requested by the defendants, which instructions are as follows:

(a) "You are further instructed that the provisions of the National Prohibition Act are to be liberally construed to the end that the use of intoxicating liquors as a beverage can be prevented; therefore, it must be proven to your satisfaction beyond a reasonable doubt and to a moral certainty that the liquor or liquors found on the premises were for the purpose of being sold as a beverage. (Section 3, Title 2, Act October 28, 1919." [78]

(b) "You are instructed that where a sale is alleged to have been made by an employee it must be proven to your satisfaction beyond a reasonable doubt and to a moral certainty that a benefit resulted to the employer by reason of the sale made by an employee; therefore, before you can convict the defendants at bar, or any of them, it must be proven to your satisfaction beyond a reasonable doubt and to a moral certainty which of the defendants derived the benefits of the sale or sales alleged to have been made."

V.

Upon newly discovered evidence, which evidence is hereto attached and made a part of this motion in the form of an affidavit of S. V. Thomas, and which evidence defendants could not, with reason-

able diligence, discover and produce at the time of trial.

C. F. TRAMUTOLO,

Attorney for Defendants and Plaintiffs in Error.

[79]

---

In the Southern Division of the United States District Court, Northern District of California, First Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOUIS CABIALE et al.,

Defendants.

**Affidavit of S. V. Thomas.**

State of California,
City and County of San Francisco,—ss.

S. V. Thomas, being first duly sworn, deposes and says:

That on and prior to the 23d day of July, 1920, he was employed by the United States Government as a prohibition enforcement officer charged with the duty of suppressing violations of the Act of October 28, 1919, more commonly known as "The National Prohibition Act."

That your affiant on the 23d day of July, 1920, between the hours of 9:30 and 10:30 P. M. of said day in company with other prohibition officers entered the barroom premises of the Gianduja Hotel and Restaurant situated at 1549 Stockton

Street, in the city and county of San Francisco, State of California; that accompanying your affiant were prohibition enforcement officers R. A. Wolf and W. D. Smith; that your affiant personally searched the barroom premises of the Gianduja Hotel and Restaurant and on said premises found a bottle of vermouth and a bottle of an unknown liquid which affiant afterwards ascertained to be mareschino; that on the drainboard of the bar of said premises, affiant found a pitcher containing an unknown liquid, a part of which liquid affiant poured into two empty Vichy Water bottles; that all of the property found in and [80] about the barroom premises of said Gianduja Hotel and Restaurant was found by your affiant; that your affiant after entering the said premises, at all times observed W. D. Smith guarding the door leading into the barroom premises, which said door is situate at the corner of Stockton and Union Streets, and that said W. D. Smith remained near said door for the purpose of preventing people from going out or coming into the barroom premises during the time that your affiant was searching the barroom premises; that your affiant was in a position to have seen W. D. Smith search the barroom premises if the said W. D. Smith had ever attempted to search the same.

That in two of the bottles labeled Vichy Water your affiant poured therein certain liquids which liquids were brought in from the dining room of the Gianduja Hotel and Restaurant and that it is untrue with respect to these two bottles, that the

same were found in or about the barroom premises.

That affiant further states that any and all property found by him on the barroom premises of the Gianduja Hotel and Restaurant were placed by him in a wooden box and that said wooden box containing the liquids so found, was taken to the prohibition enforcement office in the Appraiser's Building in the city and county of San Francisco; that the Government, in its information charged the above named defendants with having had in their possession a quantity of jackass brandy. With respect to this jackass brandy, affiant states that the said jackass brandy was not at any time or at all found in or about the premises of the Gianduja Hotel and Restaurant or barroom premises, but that the said jackass brandy was on the person of your affiant at the time of entering the barroom premises of the Gianduja Hotel and Restaurant and that affiant had procured said jackass brandy from another place which affiant had [81] searched prior to going to the premises of the Gianduja Hotel and Restaurant and that affiant inadvertently placed said jackass brandy amongst the property alleged to have been found on the premises of the Gianduja Hotel and Restaurant and barroom premises; that on one of the trial days of the above-entitled case, to wit, on September the 22d, 1920, affiant was interrogated in the presence of his wife by Assistant U. S. Attorney A. M. Hardy, with respect to the testimony he would give when called as a witness for the Government; that in said interview with Assistant U. S. Attorney

A. M. Hardy, your affiant stated that his testimony would be in substance as hereinabove stated in this affidavit; that thereafter Assistant U. S. Attorney A. M. Hardy requested affiant to go to the office of Assistant U. S. Attorney B. F. Geis, in the Post Office Building, with which request your affiant complied and in the conversation had with the Assistant U. S. Attorney B. F. Geis, affiant related the same conversation as affiant had with Assistant U. S. Attorney A. M. Hardy, which conversation was in substance as stated in this affidavit and that then and there the said Assistant U. S. Attorney B. F. Geis told affiant that he (Geis) would not use affiant as a witness.

S. V. THOMAS,

Subscribed and sworn to before me this 2d day of October, 1920.

[Seal] ETTA LAIDLAW,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Oct. 2, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [82]

In the Southern Division of the United States District Court, Northern District of California, First Division.

No. (8602).

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOUIS CABIALE et al.,

Defendants.

**Motion in Arrest of Judgment.**

Now comes the defendants Louis Cabiale and Andrew Donizello, and each of them and move to arrest the judgment herein upon the following grounds, to wit:

I.

That the said information fails to state an offense against the laws of the United States of America.

II.

That the said information fails to state an offense against the laws of the United States in this; that it appears upon the face of said information that this Court has no jurisdiction of the offense which these defendants and each of them are charged with having violated.

III.

That there is no authority in law for the filing of informations for the violation of the law which the defendants and each of them are charged with having violated.

Dated: This second day of October, 1920.

C. F. TRAMUTOLO,

Attorney for Defendants and Plaintiffs in Error.

[Endorsed]: Filed Oct. 2, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [83]

---

At a stated term of the District Court of the United States of America, for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Saturday, the 2d day of October, in the year of our Lord, one thousand nine hundred and twenty. Present, the Honorable MAURICE T. DOOLING, Judge.

No. 8602.

UNITED STATES OF AMERICA

vs.

LOUIS CABIALE and ANDREW DONIZELLO.

**Minutes of Court—October 2, 1920—Judgment.**

This case came on regularly this day for pronouncing of judgment upon said defendants, who were present in Court with attorney, C. F. Tramutolo, Esq. B. F. Geis, Esq., Asst. U. S. Atty., was present on behalf of the United States. Said defendants were then called for judgment. Mr. Tramutolo moved the Court for a new trial, which motion the Court ordered denied, and to which order exception was entered. Mr. Tramutolo moved the Court in arrest of judgment, which motion the

Court ordered denied, and to which order exception was entered. Said defendants were then called for judgment. E. Partici and E. Perasso were duly sworn and examined on behalf of the United States. After hearing Mr. Tramutolo, and no cause appearing why judgment should not be pronounced herein against said defendants, the Court ordered that each of said defendants, for the offense of which he stands convicted, herein, be imprisoned for the period of six (6) months in the county jail, city and county of San Francisco, State of California, that said defendants stand committed to the custody of the U. S. Marshal to execute said judgments, and that commitments issue accordingly. Further ordered that execution of said judgments be stayed until October 6, 1920, and in event of appeal, said defendants' bonds for appearance herein be [84] fixed in the sum of $5,000.00 each, and that said defendants have until October 6, 1920, to give and file such bonds. [85]

---

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 8602.

THE UNITED STATES OF AMERICA

vs.

LOUIS CABIALE and ANDREW DONIZELLO.

**Judgment on Verdict of Guilty.**

Convicted Viol. National Prohibition Act.

Ben F. Geis, Esq., Assistant United States Attorney, and the defendants with their counsel came into court. The defendants were duly informed by the Court of the nature of the information filed on the 29th day of July, 1920, charging them with the crime of violating the National Prohibition Act, of their arraignment and plea of not guilty; of their trial and the verdict of the Jury on the 22d day of September, 1920, to wit:

"We, the Jury, find as to the defendants at the bar, as follows: Louis Cabiale, Guilty on Counts 2, 3, 8. Not Guilty on Counts 1, 4, 5, 6, 7; Andrew Donizello, Guilty on Counts, 2, 3, 8, 9, 10; Not Guilty on Counts 1, 4, 5, 6, 7. * * *

"WM. R. PENTZ,

"Foreman."

The defendants were then asked if they had any legal cause to show why judgment should not be entered herein and no sufficient cause being shown or appearing to the Court, and the Court having denied a motion for new trial and a motion in arrest of judgment; thereupon the Court rendered its judgment; THAT, WHEREAS, the said Louis Cabiale and Andrew Donizello having been duly convicted in this Court of the crime of Violating the National Prohibition Act;

IT IS THEREFORE ORDERED AND ADJUDGED that the said Louis Cabiale and Andrew Donizello each be imprisoned for the period of six

(6) months in the County Jail, County of San Francisco, State of California. [86]

Judgment entered this 2d day of October, A. D. 1920.

WALTER B. MALING,
Clerk.
By C. W. Calbreath,
Deputy Clerk. [87]

---

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 8602.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LOUIS CABIALE et al.,
Defendants.

**Petition for Writ of Error.**

Now come the defendants Louis Cabiale and Andrew Donizello and say that in the verdict and judgment heretofore rendered against them and each of them in the above-entitled cause and in the sentence of the Court pronounced against them and each of them on the second day of October, 1920, manifest error hath happened to the grievious damage of these defendants and of each of them, as by their assignment of errors filed herewith more fully appears, and that said defendants and each of

them are aggrieved by the said verdict, judgment and sentence.

WHEREFORE said defendants pray that a writ of error issue in their behalf to the United States Circuit Court of Appeals for the Ninth Circuit, to correct the said error, and that a full, true and complete transcript of the record and proceedings in this cause, duly authenticated, be sent to said United States Circuit Court of Appeals.

Dated: this 6th day of October, 1920.

C. F. TRAMUTOLO,
Attorney for said Defendants.

[Endorsed]: Due service and receipt of a copy of the within Petition for Writ of Error is hereby acknowledged this 6th day of October, 1920.

FRANK M. SILVA,
Attorney for Pl'ff.

Filed Oct. 6, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [88]

---

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 8602.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LOUIS CABIALE et al.,
Defendants.

**Assignment of Errors.**

Now come Louis Cabiale and Andrew Donizello, defendants in the above-entitled cause and file the following assignment of errors upon which they and each of them will rely for the prosecution of the writ of error in the above-entitled cause, petition for which writ of error is filed at the same time as this Assignment of Errors:

I.

That said District Court erred in denying the motion of these defendants for a new trial.

II.

That said Court erred in denying the motion of said defendants in arrest of judgment.

III.

That said District Court had no jurisdiction to try the said cause, or to hear or to determine the same or to pronounce any judgment or sentence therein against these defendants or against any of them.

IV.

That each and every count of the information in the above-entitled cause upon which these defendants or both or either of them were convicted fails to state facts sufficient to constitute any crime or offense against the United States, in this, to wit: [89]

1. That count two of the said information, upon which count both of these defendants were convicted, does not state any crime or public offense against the United States, for that it is not alleged

in said count that the possession of the liquor therein referred to was illegal or unlawful upon the part of these defendants, or either of them, or that said liquor was possessed or used or intended by said defendants or either of them, for any illegal purpose.

2. That the third count of said information upon which count both of these defendants were convicted does not state any offense against the United States, in this, to wit, that said count contains no particulars of any offense or of any alleged sale of intoxicating liquor, and said count does not state that the sale of liquor therein referred to was for beverage purposes or for any illegal or unlawful purpose, or that either of these defendants was not authorized by law to make such sale.

3. That the eighth count of said information, upon which count both of these defendants were convicted, does not state any crime or offense against the United States in that there are no facts stated in said count to show that the alleged possession by these defendants of the intoxicating liquor therein referred to was unlawful or illegal.

4. That the ninth count of said information, upon which count the defendant Andrew Donizello was convicted, does not charge said defendant with any crime against the United States in this, to wit, that said count does not state any facts to show that the furnishing of the intoxicating liquor therein referred to by said defendant was unlawful or illegal.

5. That the tenth count of said information,

upon which count the defendant Andrew Donizello was convicted, does not charge said defendant with any crime against the United States for the reason [90] that there are no facts stated in said count showing or tending to show how or in what manner the furnishing of the intoxicating liquor, therein referred to, by said defendant, was illegal or unlawful.

V.

That the said District Court erred in refusing to give to the Jury the following instruction requested by said defendants:

"Gentlemen of the Jury: You are instructed that where a sale is alleged to have been made by an employee it must be proven to your satisfaction beyond a reasonable doubt and to a certainty that a benefit resulted to the employer by reason of the sale made by an employee; therefore, before you can convict the defendants at bar, or any of them, it must be proven to your satisfaction beyond a reasonable doubt and to a moral certainty, which of the defendants derived the benefits of the sale or sales alleged to have been made."

VI.

That the said Court erred in refusing to give to the jury the following instruction requested by said defendants:

"Gentlemen of the Jury: You are further instructed that the provisions of the National Prohibition Act are to be liberally construed to the end that the use of intoxicating liquors as to beverage can be prevented; therefore, it must be

proven to your satisfaction beyond a reasonable doubt and to a moral certainty that the liquor or liquors found on the premises were for the purpose of being sold as a beverage. (Section 3, Title 2, Act October 28, 1919)."

VII.

That the Court erred in overruling the objection made by counsel for the defendants to questions asked of and testimony given by the witness A. R. Shurtleff on his direct examination, which said questions, objections and testimony are in full as follows, to wit: [91]

"Q. On that evening, Mr. Shurtleff, will you state to the jury and court whether or not you observed liquor on the other tables, generally, or promiscuously in that place?

A. As we entered the place—

Mr. TRAMUTOLO.—Before that question is answered, whether or not they observed liquor on other tables is not the charge that we are required to meet here. The charge here is a specific charge of sale on nine counts of claret, and on one count of cocktails, and one count of whiskey; therefore, the question of whether there was liquor there on the premises cannot be binding on these defendants. Suppose the liquor was brought in, as we will prove, by patrons, how can that be binding on the defendants?

The COURT.—That probably will be a matter of defense. The objection is overruled.

Mr. TRAMUTOLO.—Exception.

Mr. GEIS.—State what you observed.

A. As we entered the place, I was surprised at the amount of colored liquid or liquor that was on the different tables. As I proceeded in, there were two couples sitting at a table, two men and two women, and I told them who I was, what my business was there, and proceeded to take the wine off the table. I gathered up all I could possibly carry from two tables at a time, and took it back to the counter, where John Kupser was sitting, and told him to take care of it. After taking one back, I went right up to the dining-room and went to the table where George Poultney and party were sitting. The wine and the cocktails which they had at this table they had removed from the top of the table, and were hiding it underneath. I told them who I was, and that I wanted what they had in the glasses, and took the cocktails and the claret away from them and took it back to Mr. Kupser, and he put it into this flask. [92]

VIII.

The Court erred in overruling objections made by counsel for the defendants to the introduction in evidence of certain checks or tickets taken from place of business of said defendants, which said checks or tickets were introduced during the testimony of the witness H. M. Kupser, and the Court further erred in the comments which it made at the time of the introduction of said evidence, as follows, to wit:

Mr. TRAMUTOLO.—If your Honor please, if the Government proposes now to introduce these checks, I certainly object to their introduction on the

ground that there is no means of identifying them.

The COURT.—He says he knows them.

Mr. GEIS.—Q. Are they in the same condition now that they were when you got them?

A. They are.

Q. With the exception that they are torn apart?

A. Yes.

IX.

The Court erred in admitting in evidence, over the objection of the defendant, certain bottles of liquor and in making various comments upon the same, which said proceedings occurred during the testimony of the witness R. F. Love, and were as follows, to wit:

Q. I hand you United States Exhibit No. 4 for Identification, and ask you if you ever saw that bottle before, and its contents? A. Yes.

Q. At the time that the bottle was handed to you, was it sealed? A. It was.

Q. And did you analyze it?

A. I did; I determined the alcoholic content of it.

Q. What did it analyze? A. 33.1 per cent.

Q. Alcohol? A. Yes.

The COURT.—Q. By volume? A. By volume.

Mr. GEIS.—Q. By the way, who did you receive that bottle from? A. From Mr. Estell. [93]

Q. I show you United States Exhibit 5 for identification and ask you if you ever saw that bottle before, and if you analyzed it? A. Yes, I did.

Q. And what was the result?

A. Alcohol, 2.55 per cent, by volume.

Q. And I hand you a bottle referred to as being

in the box, and ask you if you have ever seen that bottle before? A. I have.

Q. Did you also receive that from Mr. Estell?

A. Yes.

Q. And did you make a chemical analysis of it?

A. I did.

Q. With what result?

A. Alcohol, 17.8 per cent by volume.

Q. And I hand you another one heretofore testified to, have you seen that bottle before?

A. Yes.

Q. And did you make a chemical analysis of its contents? A. Yes.

Q. With what result?

A. Alcohol, 48.6 per cent by volume.

The COURT.—Q. Do you know what liquor it is?

A. I think that one contained whiskey.

Mr. GEIS.—Q. And this one, do you remember what this one contained?

A. No, I didn't decide what that was.

Q. But some alcoholic liquor? A. Yes.

Q. I hand you another bottle, testified as being in the box, and ask you if that was handed you by Mr. Estell? A. It was.

Q. And did you make a chemical analysis of that?

A. Yes, I did.

Q. With what result?

A. Alcohol, 45.25 per cent by volume.

Q. And, in your best judgment, what was it?

A. I think brandy, but I am not sure.

Q. And also another bottle testified to as having been in the box. Did you ever see that before?

A. Yes, I did.

Q. And did you make a chemical analysis of that one? A. Yes.

Q. With what result? A. 45.25 per cent.

[94]

The COURT.—Q. That would be about 90 proof?

A. Yes, sir.

Mr. GEISS.—Q. And what, in your best judgment, was that?

A. I did not decide. I didn't have very much time to work on it, and I didn't decide.

Mr. GEISS.—We offer them in evidence.

Mr. TRAMUTOLO.—To which we object as immaterial, irrelevant and incompetent, there being no evidence here—

The COURT.—Who labeled these bottles?

Mr. GEIS.—The labels that are placed on these bottles were placed by the chemist; Chemist No. 584; September 20, 1920; Gianduja Café; Brandy; alcoholic content; Officers Poultney and others. They all contain the same label, your Honor, with the exception of the content.

Mr. TRAMUTOLO.—The testimony of Mr. Poultney was that he did not find any of this property there, and he didn't see it found.

The COURT.—I don't attach much importance to that objection, Mr. Tramutolo; he saw it in the box on the counter in the barroom.

Mr. TRAMUTOLO.—That is just the point, your Honor; I don't believe that there was any testimony that Mr. Poultney saw it in the box.

The COURT.—Well, I am willing to let it go to the jury on that proposition.

Mr. TRAMUTOLO.—I reserve an exception. The labels, as they appear, were signed by Mr. Poultney.

The COURT.—The objection is overruled.

Mr. TRAMUTOLO.—I reserve an exception.

X.

The Court erred in refusing to admit certain evidence offered by said defendants, as following, to wit: [95]

Mr. TRAMUTOLO.—If your Honor please, that practically concludes the case so far as the defendants are concerned; I still would like to renew my motion for the introduction of certain tags of July 22d and 23d, upon this theory, that if liquor was sold promiscuously on that day there would be entries on these tags; these tags, as I stated to you this morning, must be kept, by reason of the fact that the Government is entitled to a tax, and having the Government's receipt there can be no inaccuracy upon the tags for the entire month. Now, if the theory of the Government is that liquor was promiscuously sold, every one of these tags would have to be changed in the meantime.

The COURT.—Not at all. Let us assume, I do not say this except as an assumption, that the contents of that pitcher was wine. Now, if somebody orders the wine, and they go to the pitcher and bring it out. I suppose on the tags it would appear as grape juice. Other men order cocktails, and on the tags it would appear as cocktails. You cannot tell

from the tags what the alcoholic content of the article is. You are undertaking to show by the fact that these things were not registered there is no violation of the law. This is simply encumbering the record without proving anything.

Mr. TRAMUTOLO.—The point I want to make is, why should they be permitted to take isolated tags and we not be able to produce all of the tags?

The COURT.—They have produced tags that show the sale of liquor, and to counteract that you want to offer these tags that on their face do not show the sale of liquor.

Mr. TRAMUTOLO.—In other words, I want to introduce all of the tags for those two days.

The COURT.—The motion will be denied.

Mr. TRAMUTOLO.—To which we reserve an exception. [96]

WHEREFORE, said defendants pray that their petition for a writ of error be allowed and that the judgment of the said District Court be reversed.

Dated this 6th day of October, 1920.

C. F. TRAMUTOLO,
Attorney for said Defendants.

[Endorsed]: Due service and receipt of a copy of the within Assignment of Errors is hereby acknowledged this 6th day of October, 1920.

FRANK M. SILVA,
Attorney for Plaintiff.

Filed Oct. 6, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [97]

At a stated term of the District Court of the United States of America for the Northern District of California First Division, held at the courtroom thereof, in the city and county of San Francisco, on Wednesday, the 6th day of October, in the year of our Lord one thousand nine hundred and twenty. Present, The Honorable MAURICE T. DOOLING, Judge.

No. 8602.

UNITED STATES OF AMERICA

vs.

LOUIS CABIALE and ANDREW DONIZELLO.

**Minutes of Court—October 6, 1920—Order Allowing Writ of Error.**

On motion of C. F. Tramutolo, Esq., attorney for defendants herein, and presenting petition for writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgments heretofore entered herein, the Court ordered that said appeal be allowed and that pending determination thereof, said defendants be allowed to be admitted to bail in the sum of Five Thousand ($5000.00) Dollars each, and that they each have one day from the date hereof within which time to file such bond. [98]

In the Southern Division of the United States District Court, Northern District of California, First Division.

No. 8602.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOUIS CABIALE et al.,

Defendants.

**Order Allowing Writ of Error.**

Upon the filing of the petition for a writ of error in the above-entitled cause and GOOD CAUSE APPEARING THEREFOR,

IT IS HEREBY ORDERED that the said petition for a writ of error be allowed as to said defendants Louis Cabiale and Andrew Donizello, and each of them, and that the clerk of the above-entitled Court be directed and he is hereby directed to transmit to the clerk of the Circuit Court of Appeals in and for the Ninth Circuit, a full, true and complete transcript of the record of proceedings in the above-entitled cause and that during the pendency of said writ of error all proceedings in this Court be suspended and stayed, and that the said defendants and each of them be admitted to bail in the sum of Five Thousand Dollars each.

Dated this 6th day of October, 1920.

M. T. DOOLING,

Judge.

[Endorsed]: Filed Oct. 6, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [99]

---

**Certificate of Clerk U. S. District Court to Transcript of Record.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 99 pages, numbered from 1 to 99, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the case of The United States of America, vs. Louis Cabiale and Andrew Donizello, No. 8602, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on writ of error (copy of which is embodied herein), and the instructions of the attorney for defendants and plaintiffs in error herein.

I further certify that the cost for preparing and certifying the foregoing transcript on writ of error is the sum of Forty-two Dollars and Ten Cents ($42.10) and that the same has been paid to me by the attorney for the plaintiffs in error herein.

Annexed hereto are the original writ of error (page 101), return to writ of error (page 104) and original citation on writ of error (page 105).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 26th day of April, A. D. 1921.

[Seal] WALTER B. MALING,
Clerk,
By C. M. Taylor,
Deputy Clerk. [100]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 8602.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOUIS CABIALE et al.,

Defendants.

**Writ of Error.**

United States of America,—ss.

The President of the United States of America to the Honorable Judges of the Southern Division of the United States District Court for the Northern District of California, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between the United States of America, plaintiff, and Louis Cabiale and Andrew Donizello et al., defendants, manifest error hath happened, to the great damages of the said Louis Cabiale and Andrew Donizello, as by their complaint appears;

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all

things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, ought to be done. [101]

WITNESS, the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the United States, the 6th day of October in the year of our Lord one thousand nine hundred and twenty.

[Seal] Attest: WALTER B. MALING,
Clerk of the U. S. District Court for the Northern District of California.

By C. M. Taylor,
Deputy Clerk.

AND NOW, to wit, on this 6th day of October 1920, IT IS ORDERED, that the foregoing writ of error be and the same is hereby allowed.

M. T. DOOLING,
District Judge. [102]

Due service and receipt of a copy of the within writ of error is hereby admitted this 6th day of October 1920.

FRANK M. SILVA,
Attorney for Plff.

[Endorsed]: No. 8602. In the Southern Division of the United States District Court for the Northern

District of California, First Division. United State of America, Plaintiff, vs. Louis Cabiale et al., Defendants. Writ of Error. Filed Oct. 6, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [103]

---

**Return to Writ of Error.**

The answer of the Judges of the District Court of the United States of America, for the Northern District of California, to the within writ of error:

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained.

We further certify that a copy of this writ was on the sixth day of October, A. D. 1920, duly lodged in the case in this court for the within named defendant in error.

By the Court.

[Seal] WALTER B. MALING,
Clerk U. S. District Court, Northern District of California.

By C. M. Taylor,
Deputy Clerk. [104]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

LOUIS CABIALE and ANDREW DONIZELLO,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

**Citation on Writ of Error.**

United States of America,—ss.

The President of the United States to the United States of America, GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city and county of San Francisco in the State of California, within thirty (30) days from the date hereof, pursuant to a Writ of Error duly issued and now on file in the Clerk's office of the United States District Court for the Southern Division of the Northern District of California, wherein Louis Cabiale and Andrew Donizello are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties aforesaid in that behalf.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 6th day of October 1920.

M. T. DOOLING,
United States District Judge. [105]

Due service and receipt of a copy of the within Citation on Writ of Error is hereby admitted this 6th day of October, 1920.

FRANK M. SILVA,
Attorney for Plff.

[Endorsed]: No. 8602. In the United States Circuit Court of Appeals for the Ninth Circuit. Louis Cabiale and Andrew Donizello, Plaintiffs in Error, vs. United States of America, Defendant in Error. Citation on Writ of Error. Filed Oct. 6, 1920. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [106]

---

[Endorsed]: No. 3679. United States Circuit Court of Appeals for the Ninth Circuit. Louis Cabiale and Andrew Donizello, Plaintiffs in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.

Filed April 26, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

LOUIS CABIALE and ANDREW DONIZELLO,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

**Order Extending Time to and Including December 15, 1920, to File Record and Docket Cause.**

Good cause appearing therefor, IT IS HEREBY ORDERED that the plaintiffs in error in this cause may have and they are hereby granted to and including the 15th day of December, 1920, in which to file the record thereof and docket the case with the clerk of this Court, and the time for such filing and docketing is hereby enlarged accordingly.

Dated: This first day of November, 1920.

WM. W. MORROW,
Circuit Judge.

Rec'd a copy of the within order this 1st day of November, 1920.

FRANK M. SILVA,
U. S. Attorney.
ALBERT M. HARDIE,
Asst. U. S. Attorney.

[Endorsed]: No. 3679. In the United States Circuit Court of Appeals for the Ninth Circuit. Louis

Cabiale and Andrew Donizello, Plaintiffs in Error, vs. United States of America, Defendant in Error. Order Under Rule Sixteen Enlarging Time within which to File Record and Docket Cause. Filed Nov. 5, 1920. F. D. Monckton, Clerk. Re-filed Apr. 26, 1921. F. D. Monckton, Clerk.

---

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

LOUIS CABIALE and ANDREW DONIZELLO,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

**Order Extending Time to and Including February 1, 1921, to File Record and Docket Cause.**

Good cause appearing therefor, IT IS HEREBY ORDERED that the plaintiffs in error in this cause may have and they are hereby granted to and including the first day of February, 1921, within which to file the record thereof and docket the case with the clerk of this court, and the time for such filing and docketing is hereby enlarged accordingly.

Dated: this 14th day of December, 1920.

W. H. HUNT,
Circuit Judge.

The above order extending time within which docket cause is hereby approved.

FRANK M. SILVA,
U. S. Attorney.

Receipt and service of within is hereby admitted this 14th day of December, 1920.

FRANK M. SILVA,
U. S. Atty.
By J. I. COPESTAKE,

[Endorsed]: No. 3679. In the United States Circuit Court of Appeals for the Ninth Circuit. Louis Cabiale and Andrew Donizello, Plaintiffs in Error, vs. United States of America, Defendant in Error. Order Under Rule Sixteen Enlarging the Time Within Which to File Record and Docket Cause. Filed Dec. 14, 1920. F. D. Monckton, Clerk. Refiled Apr. 26, 1921. F. D. Monckton, Clerk.

---

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

LOUIS CABIALE and ANDREW DONIZELLO,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

**Order Extending Time to and Including March 1, 1921, to File Record and Docket Cause.**

Good cause appearing therefor, IT IS HERE-

BY ORDERED that the plaintiffs in error in this cause may have and they are hereby granted to and including the first day of March, 1921, within which to file the record thereof and docket the case with the clerk of this court, and the time for such filing and docketing is hereby enlarged accordingly.

Dated: This 31st day of January 1921.

WM. W. MORROW,
Circuit Judge.

The above order extending time within which to docket cause is hereby approved.

FRANK M. SILVA,
U. S. Attorney.
By ALBERT M. HARDIE,
Asst. U. S. Attorney.

[Endorsed]: No. 3679. In the United States Circuit Court of Appeals for the Ninth Circuit. Louis Cabiale and Andrew Donizello, Plaintiffs in Error, vs. United States of America, Defendant in Error. Order Extending Time. Filed Feb. 1, 1921. F. D. Monckton, Clerk. Re-filed Apr. 26, 1921. F. D. Monckton, Clerk.

---

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 8602.

LOUIS CABIALE and ANDREW DONIZELLO,
Plaintiffs in Error.

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

**Order Extending Time to and Including April 1, 1921, to File Record and Docket Cause.**

Good cause appearing therefor, IT IS HEREBY ORDERED that the plaintiffs in error in this cause may have and they are hereby granted to and including the first day of April, 1921, within which to file the record thereof and docket the case with the clerk of this court, and the time for such filing and docketing is hereby enlarged accordingly.

Dated: This 26th day of February, 1921.

WM. W. MORROW,
Circuit Judge.

The above order extending time within which to docket cause is hereby approved.

FRANK M. SILVA,
United States Attorney.
By BEN F. GEIS,
Asst. U. S. Attorney.

[Endorsed]: No. 3679. No. 8602. In the United States Circuit Court of Appeals for the Ninth Circuit. Louis Cabiale and Andrew Donizello, Plaintiffs in Error, vs. United States of America, Defendant in Error. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including Apr. 1, 1921, to File Record and Docket Cause. Filed Feb. 26, 1921. F. D. Monckton, Clerk. Re-filed Apr. 26, 1921. F. D. Monckton, Clerk.

No. 3679

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

---

LOUIS CABIALE and ANDREW DONIZELLO,
*Plaintiffs in Error,*

vs.

THE UNITED STATES OF AMERICA,
*Defendant in Error.*

---

## BRIEF FOR PLAINTIFFS IN ERROR.

---

CHAUNCEY F. TRAMUTOLO,
*Attorney for Plaintiffs in Error.*

FILED
OCT 4 - 1921
F. D. MONCKTON,
CLERK.

No. 3679

IN THE

# United States Circuit Court of Appeals

**For the Ninth Circuit**

---

LOUIS CABIALE and ANDREW DONIZELLO,
*Plaintiffs in Error,*

vs.

THE UNITED STATES OF AMERICA,
*Defendant in Error.*

## BRIEF FOR PLAINTIFFS IN ERROR.

### Abstract of the Case.

The plaintiffs in error, together with Pietro Gabalo, G. Bertollotti, Peter Zurich, Attilio Parcelini, Frank Colai and Dante Forasiepi, were informed against in the Southern Division of the District Court for the Northern District of California for violating the so-called National Prohibition Act. The information, which will be found at pages 2-21 of the Transcript of Record, is in eleven counts, which charge or attempt to charge in substance as follows:

FIRST COUNT.

That on the 22nd day of July, 1920, the defendants therein named maintained a common nuisance at a

place known as the Gianduja Hotel, in that they did keep on the premises certain claret wine of an alcoholic content prohibited by the statute.

SECOND COUNT.

That the defendants on the same date did wilfully, unlawfully and knowingly *have in their possession* certain intoxicating liquor, to wit, claret wine.

THIRD COUNT.

That the defendants on the same day did *sell* certain intoxicating liquor, to wit, claret wine.

FOURTH, FIFTH AND SIXTH COUNTS.

These counts are identical in phraseology with the third, each of them charging that the defendants on the 22nd day of July, 1920, and at the same place, did sell claret wine of prohibited alcoholic content.

SEVENTH COUNT.

That on the 23rd day of July the defendants, at the same place, did unlawfully, wilfully and knowingly maintain a common nuisance, in that they did then and there keep claret wine, jackass brandy, vermouth, and mareschino of prohibited alcoholic content.

EIGHTH COUNT.

That the defendants, on the 23rd day of July, did unlawfully, wilfully and knowingly *have in their possession,* on the same premises, claret wine, jackass brandy and mareschino.

NINTH COUNT.

That the defendants, on the 23rd day of July, at the same place, did unlawfully, wilfully and knowingly *furnish* to George Poultney and C. W. Herbert certain intoxicating liquor, to wit, claret wine containing a prohibited alcoholic content.

TENTH COUNT.

That the defendants, on July 23rd, at the same place, did unlawfully, wilfully and knowingly furnish to George Poultney and C. W. Herbert certain intoxicating liquor, to wit, cocktails.

ELEVENTH COUNT.

That on the last mentioned day, and at the same place, the defendants did unlawfully, wilfully and knowingly, sell certain intoxicating liquor, to wit, whiskey.

The jury by its verdict (Transcript, page 27) found the plaintiff in error Cabiale guilty on counts two, three and eight, and the plaintiff in error Donizello guilty on counts two, three, eight, nine and ten. The other defendants were found not guilty on all counts. The eleventh count was withdrawn by the court from the consideration of the jury, by reason of the fact that there was no evidence introduced as to any sale of whiskey (Transcript, page 93). Thereafter the plaintiffs in error moved for a new trial upon the ground that the verdict was against the law, and the evidence, and also upon the ground of newly discovered evidence. A motion

in arrest of judgment was also interposed (Transcript, page 105) upon the ground that the information failed to state an offense against the laws of the United States. These motions were denied by the court, which thereupon passed judgment that both of the plaintiffs in error be imprisoned for the period of six months in the county jail (Transcript, page 116).

A writ of error having been duly allowed, the cause is before this court for review.

---

**Specifications of Errors.**

In accordance with the provisions of Rule 24 of this court, we now specify the errors relied upon, and shall set out the same separately and particularly.

It is our contention that the judgment of the court below should be reversed for the following errors, to wit:

(1) That the court below erred in passing judgment of imprisonment upon the plaintiffs in error for the reason that count three of the information does not state facts sufficient to charge any crime against the United States, and the remaining counts of the information upon which each of the plaintiffs in error was convicted do not even attempt to allege any violation of the Volstead Act for which a penalty of imprisonment is provided.

(2) That the verdict of the jury and the judgment of the court was against law in this, that all of the counts upon which each of the plaintiffs in error was convicted was based upon the same alleged violation of the law, and that the verdict and judgment, therefore, violated the rule which prohibits the splitting of one transaction into several offenses.

(3) That as to both of the plaintiffs in error, the evidence was insufficient to justify the verdict.

(4) That the trial court erred in admitting in evidence, over the objection of the plaintiffs in error, certain tags taken from the cash register of the Gianduja Restaurant (Transcript of Record, page 41) and also erred (Transcript, pages 86 and 87) in denying the offer of the defense to introduce certain other tags in evidence.

(5) That the trial judge committed a plain error within the meaning of Rule 11 of this court in giving the following charge to the jury:

> "We have here a number of defendants charged with a violation of the National Prohibition Law. Now, I need not say to you that whatever the sentiment is for or against the enforcement of this Prohibition Law, that is a matter with which you and I are not concerned. Your duty, equally with mine, under your oaths, and my oath, is to administer the law as we find it, whether we agree with the principle or purpose of it, or not. We have in this court, awaiting trial, some 200 or 300 defendants charged under this law. Whether these men are

guilty or innocent will be determined by each jury as the facts are presented to them. The acquittal of a man who is guilty of any charge simply encourages other men to go out and commit a similar offense. No law can be enforced without the assistance of the jury, who have the final say in all criminal cases. Now, if juries are going to acquit men who are guilty, the result will be that we will never get through. Unfortunately, this is the only court in this district, extending from the county of Monterey to the Oregon line, and from the Pacific Ocean to Nevada, upon which the enforcement of this law falls, and without the assistance of the jury we cannot enforce it at all. I say this not to influence you in passing upon this case, or any subsequent one, but to impress upon your minds that in dealing with these matters you are dealing with a very important subject. We are dealing with a law that has been adopted by a majority, we must abide by it and attempt to enforce it until such time, if that time ever comes, that the law may be changed. It is also true that men who violate this law do it because they make money out of it. There is no question of any principle involved in so far as they are concerned. When they violate the law, they violate it because they can make money by so doing. Now, I think this court has been quite vigilant in protecting the rights of citizens and individuals from the sometimes over-zealous acts of officers in the enforcement of this law, but the court will be equally vigilant in upholding the officers in acts where they are acting within the law. There can be no question of the legality of the actions of the officers in the present case."

We shall now proceed to a discussion of these counts in the order indicated.

## Brief of the Argument.

### I.

**THE THIRD COUNT OF THE INFORMATION DOES NOT CHARGE ANY CRIME OR OFFENSE AGAINST THE UNITED STATES.**

It was only upon the verdict finding the plaintiffs in error guilty on the third count that the trial judge had any jurisdiction to impose a sentence of imprisonment upon either of the plaintiffs in error. This count attempts to charge them with having made a sale of liquor on the 22nd day of July, 1920. On the other counts of the information which charge sales and on the first count, which charged the maintaining of a nuisance, the plaintiffs in error were found not guilty; while the counts other than the third, on which they were convicted, merely charged possession or furnishing of liquor, for which a jail sentence could not, under the provisions of the Volstead Act, be imposed (Section 29, Title II of the National Prohibition Act). The trial judge did not impose separate sentences on each of the counts on which the defendants were convicted, but passed a sentence of imprisonment upon each of them, without any reference whatever as to the separate counts. It was only on the verdict as to count three that any sentence of imprisonment could be passed. If, therefore, that count is fatally defective, the judgment must be reversed.

The charging part of the third count reads as follows:

> "Did then and there wilfully, unlawfully and knowingly, and in violation of Section 3, Title

> II of the Act of October 28, 1919, known as the National Prohibition Act, sell certain intoxicating liquors, to wit, claret wine, containing one-half of one percent or more of alcohol by volume, and then and there fit for use for beverage purposes. That the sale of the said intoxicating liquor by the said defendants, at the time and place aforesaid, was then and there prohibited and unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act."

It will be noted that this count of the information merely charges that the defendants did *sell* the liquor therein referred to, and that the same was fit for use for beverage purposes. It is not charged that the liquor was, in fact, sold for beverage purposes. Under the fundamental rules of law applicable to indictments and informations, it must, therefore, be presumed that the liquor was not, in fact, sold for beverage purposes. The information must be construed as against the pleader; no intendment or inference can be indulged in favor of a defective indictment or information.

The statute upon which this information is based does not make all sales of liquor that is fit for use for beverage purposes unlawful. If it attempted to do so, it would be void, because the statute would then transcend the power given to Congress by the Eighteenth Amendment to the Constitution. It will be conceded at the outset, we believe, that in the absence of a constitutional amendment Congress would have had no power to pass such an act as the so-called Volstead Act. Prior to the adoption of that

amendment the right to prohibit the sale of alcoholic liquors rested solely within the police powers of the several states. The Constitution of the United States is a grant of power, and the various departments of the Federal Government possess only those powers which are expressly or impliedly conferred upon them by the Constitution.

So. Carolina v. United States, 199 U. S. 437;
Martin v. Hunter, 1 Wheaton, 304;
Sponner v. McConnell, 22 Fed. Cases No. 13,245;
United States v. McCullaugh, 221 Fed. 288.

An Act of Congress for the enforcement of a constitutional provision is void if it is broader in its terms than the constitutional provision which it was enacted to enforce.

Karem v. United States, 121 Fed. 250.

Now the 18th Amendment to the Constitution merely prohibits the manufacture, sale, and transportation of liquor for *beverage purposes.* It would, therefore, be beyond the power of Congress to prohibit sales of liquor for other than beverage purposes, and the third count of this information, which merely charges a sale of liquor without alleging that the sale was made for beverage purposes, charges a crime which Congress had no constitutional power to create.

Furthermore, the third count of this information is insufficient, even under the Volstead Act itself. The information does not even follow the language

of the statute. Section 6 of Title II of the Act provides that,

> "No one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit from the Commissioner so to do."

For all that appears from the third count of the information to the contrary, the defendants may have had a permit from the Commissioner of Internal Revenue authorizing them to sell liquor. An information founded upon a statute must cover every element included in the statutory definition of the crime; and exceptions contained therein must be negatived, in order that the description of the crime may in all respects coincide with the statute.

People v. Miles, 9 Cal. App. 312.

In that case it is said by Presiding Judge Cooper,

> "The law does not presume any material fact not stated in the information as all presumptions are in favor of innocence. If the matters and things set forth in the information may be true under certain circumstances, and the defendant under such circumstances and conditions not guilty of any crime, then the information is not sufficient."

It was said by the Supreme Court of the United States in United States v. Cook, 17 Wallace 169:

> "Offenses created by statute at common law must be accurately and clearly described in an indictment, and if they cannot be in any case without an allegation that the accused is not within an exception contained in the statute defining the offense, it is clear that no indict-

> ment founded upon the statute can be a good one which does not contain such an allegation, as it is universally true that no indictment is sufficient that does not accurately and clearly allege all the ingredients of which the offense is composed. With rare exceptions offenses consist of more than one ingredient, and in some cases of many; and the rule is universal that every ingredient of which the offense is composed must be accurately and clearly alleged in the indictment, or the indictment will be bad, and may be quashed on motion, or the judgment may be arrested, or be reversed on error."

In view of the failure of the information to follow the statutory description of the crime attempted to be charged, and for the reason tht any statute which attempted to make it a criminal offense to sell liquor for other than beverage purposes would be beyond the power of Congress to enact, we submit that the third count of the information charges no crime. Since this count is the only count on which either of the defendants was convicted on which a sentence of imprisonment could be imposed, it was error of the court to impose the same, and the judgment should be reversed.

---

## II.

### THE VERDICT OF THE JURY AND THE JUDGMENT OF THE COURT WAS AGAINST LAW.

An examination of the several counts in the information reveals the fact that the liquor which in count three the defendants are charged with selling, is the same as that which in other counts of the in-

formation they are charged with possessing and furnishing. Obviously, liquor that is sold must also be possessed. Furthermore, the evidence clearly shows that the various offenses attempted to be charged in the various counts of the information are one and the same transaction. It is a sound rule of law, founded upon the plainest principles of natural justice that where a criminal act has been committed, every part of which may be alleged in a single count of an indictment and proved under it, the act cannot be split into several distinct crimes.

---

## III.

### THE EVIDENCE WAS INSUFFICIENT TO JUSTIFY THE VERDICT.

It is our contention that the evidence in this case is insufficient to justify the verdict, at least, in so far as it relates to the third count, for two reasons.

*First.* The evidence fails to show a sale of liquor by either of the defendants. It will be borne in mind, as we have previously pointed out, that the third count is the only count in the information charging a sale on which the defendants were convicted. This count alleges a sale made by the defendants on the 22nd of July of claret wine. Now, the only testimony as to any sale of claret wine is the testimony of the witness Poultney (Transcript, page 30). Poultney's testimony in that behalf is as follows:

> "I was in the place of Mr. Cabiale with these gentlemen on July 22nd, the evening before. I

saw Mr. Cabiale there, I believe, on that evening, and I observed, as I was leaving, the gentleman with the bald head next to Mr. Cabiale. On that evening we bought four glasses of claret. On the first night the time we went there they charged 25c a drink for the claret; the next night, for some reason, we did not pay anything at all. The reason was everybody said the place was raided and we had better get out of there, so I, with my party, we got out, with the rest of the patrons of the place. On the evening of the 22nd we had two rounds, we drank the claret; one of the glasses we poured into a bottle—one of the glasses of claret. The first night I had spoken to Mr. Cabiale and told him that I had come down for a little something to eat, and I wanted to get something to drink, and he said that was all right, I could have what I wanted. I do not see anybody here of these defendants that served the liquor on that night. Mr. Cabiale ushered me to a seat and took my order, and subsequently I was served by a waiter. I gave my order for eats and drinks to Mr. Cabiale."

This is the entire testimony with respect to the sale made to George Poultney and party, as charged in Count Three of the information. There were no other witnesses to corroborate Mr. Poultney's testimony. There is no testimony in the entire transcript that the defendant Donizello was in the restaurant on July 22nd, as charged in Count Three of the information. The witness Poultney does not testify that he ordered claret or any other intoxicating liquor from Cabiale, and he states specifically that the person who served him with the liquor was not one of the defendants on trial. The only evi-

dence as to the alcoholic content of this alleged claret is as follows: Poultney testifies (pages 30-31) that on the evening of the 22nd, he poured the contents of one of the glasses into a bottle. On cross-examination, the witness admitted that he could not tell the quantity of alcohol which a drink contained, "except on a very strong drink" (page 31). R. F. Love, the government chemist, who testified as to the alcoholic content of the exhibits, admitted that grape juice, exposed to the air, will acquire the same alcoholic content as wine when originally made. In view of the failure of the witness to testify that he had ordered any alcoholic liquor, and the admission of the government's chemist that the alcoholic content of the exhibit might have been due to exposure to the air, we submit that the evidence is insufficient as a matter of law to justify the verdict.

*Second.* Even if the evidence hereinabove quoted should be held sufficient to have justified the jury in drawing an inference that the defendant Cabiale authorized the sale of claret to Poultney and his party, nevertheless, the conviction on the third count of the information must be reversed for another reason. Poultney was a government officer, testifying, "I am a Federal Prohibition Agent, and have been such since the time prohibition took effect, some time in January, 1920." He then proceeds to give the testimony previously quoted to the effect that he went into the Gianduja Restaurant on the night in question and solicited the defendant Cabiale to make the

sale of liquor alleged in Count Three of the information.

This brings the case clearly within the rule of the agent provocateur. That rule has been well stated by Presiding Justice Gilbert of this court in Woo Wai v. United States, 223 Fed. 415. That case, as this court will remember, was an indictment for an alleged conspiracy on the part of the defendants to smuggle certain Chinese across the border from Mexico into the United States. The evidence showed that the commission of the alleged offense was suggested by Federal officers. After reviewing the evidence, Judge Gilbert says:

> "We are of the opinion that it is against public policy to sustain a conviction obtained in the manner which is disclosed by the evidence in this case, and that a sound public policy can only be upheld by denying the criminality of those who are thus induced to commit acts which infringe the letter of the criminal statutes."

The earlier authorities, state and Federal, to the same effect, are collected and quoted from elaborately in the footnote to the decision in the Woo Wai case, in 137 C. C. A. 609.

In the later case of Sam Yick v. United States, 240 Fed. 60, the Woo Wai case and the earlier cases to the same effect are cited with approval, and this court reiterates its stand that it will not sanction a conviction for a crime incited by the solicitation of Government officers.

In United States v. Echols, 253 Fed. 862, the court, after stating the agent provocateur rule, goes on to say:

> "This rule does not proceed from or rest on any limitation of the right of the officers of the law to obtain evidence of crime in any manner possible, nor is it a defense to a prosecution that the officer participated in the commission of a crime, if the genesis of the idea, or the real origin of the criminal act, sprang from the defendant and not from the officer; or as the differentiation is well stated in 12 Cyc. 160: 'The fact that a detective or other person suspected that the defendant was about to commit a crime, and prepared for his detection, as a result of which he was entrapped in its commission, is no excuse, if the defendant alone conceived the original criminal design.' But this statement in no manner authorizes Government officers, employed to prevent crime and apprehend criminals, to thus conceive and set on foot the commission of an offense merely in order to make an arrest."

In the case at bar the evidence of Poultney herein above quoted clearly shows that the offense of selling liquor, if any were committed, was committed at the instigation and suggestion of Poultney himself. There is no conflict about that phase of the evidence. The test has been laid down in the foregoing cases is this: was the criminal offense suggested by the officer or did it originate in the mind of the accused? In the former case the undoubted law prevalent in the federal courts is that a conviction of the accused for a crime suggested by the officer will not be upheld. Now it appears in this

case without contradiction that the sale charged in the third count of the indictment had its genesis in the mind of Poultney and not in the mind of Cabiale. The latter made no suggestion as to any sale of liquor; it was the government officer who went to the restaurant keeper and told him that he wanted to get something to drink. Had it not been for Poultney's request and suggestion the sale would not have been made.

As to the defendant Donizelo, there is not a word of evidence to uphold his conviction on Count Three in view of Poultney's testimony that he did not see him on the night of July 22nd. It is true that the evidence shows that Donizelo was one of the owners of the Gianduja Restaurant, but that alone is not sufficient to charge him with liability for the act of his partner or of one of his employes which he did not authorize. Proof of express authorization is necessary to charge one with criminal responsibility for the acts of another.

The cases are uniform to this effect. We will call the attention of the court to a few of them. In People v. Green, 22 Cal. App. 45, 50, it is said:

> "The civil doctrine that a principal is bound by the acts of his agent within the scope of the latter's authority has no application to criminal law (1 McLain on Criminal Law, sec. 188). While false pretenses may be made to (by?) an agent of (to?) the person defrauded, yet when made by an agent they must be directly authorized or consented to in order to hold the principal, for authority to do a criminal act will not be presumed (1 McLain on Criminal Law, sec. 683)."

Commonwealth v. Stevens, 155 Mass. 291, 29 N. E. 508, was a prosecution for illegally selling liquor to a minor. The evidence showed that the sale was made by the clerk of the defendant. The court says:

> "The criminal liability of a master for the act of his servant does not extend so far as his civil liability, inasmuch as he cannot be held criminally for what the servant does contrary to his orders, and without authority, express or implied, merely because it is in the course of his business, and within the scope of the servant's employment; but he would be civilly liable for a tort of this kind (George v. Gobey, 128 Mass. 289; Roberge v. Burnham, 124 Mass. 277)."

In Grant Bros. Const. Co. v. United States, 13 Ariz. 388, 114 Pac. 955, it is said:

> "This act, a statute of the United States, being penal in its consequences, must be strictly construed, and as knowledge is the principal and indispensable ingredient of the offense, the government, the plaintiff in the case, must be held to proof of such knowledge or to proof of circumstances from which it might be fairly inferred. Unless the evidence, therefore, affords proof of knowledge by the construction company, or proof of circumstances from which such knowledge may be fairly inferred, of the acts of Carney and his associates, the construction company cannot be held liable for such acts of Carney, for the master or principal is not liable criminally for the unlawful acts of his agents or servants, though such unlawful act be committed in the master's business, unless such unlawful act was directed by him or knowingly assented to or acquiesced in."

In State v. Heneghan, 73 West Virginia 706, 81 S. E. 539, we read:

> "The relation of principal and agent, or of employer and employe, is not recognized in the criminal law. By that law, every man must stand for himself."

In cases involving the alleged illegal sale of liquor, the decisions are uniform to the effect that the master is not criminally liable for illegal sales made by his clerk, servant or agent, without his knowledge or consent, express or implied, or in his absence and in disobedience to his commands or instructions. For example, under the Iowa statute relating to liquor nuisances, it was held that one is not liable criminally for an unlawful sale made without his knowledge and consent by his clerk.

State v. Hayes, 67 Iowa 27; 24 N. W. 575.

See also to the same effect:

Grosch v. Centralia, 6 Ill. App. 107;
Lathrope v. State, 51 Ind. 192;
Wadsworth v. State (Texas), 34 S. W. 934.

Thus it has been held that a conviction of selling intoxicating liquor without a license cannot rest upon the evidence merely that the person who made the sale was the defendant's clerk, in the absence of any evidence that defendant authorized the sale or participated therein.

Daniel v. State, 149 Ala. 44; 43 S. 22;
Seibert v. State, 40 Ala. 60.

To warrant a conviction for sales made by defendant's bartender in violation of the law, it must appear that defendant gave no orders not to make such sales, or that if such orders were given they were not in good faith.

Commonwealth v. Tittlow, 28 Pa. Co. Ct. 341.

In the Rhole Island case of State v. Burke, 15 R. I. 324, 4 Atl. 761, it was held that one cannot be convicted of maintaining a liquor nuisance by proof of sales on Sunday by an agent without proof of knowledge on the part of defendant, and without proof of authority, either express or implied.

For these reasons we submit that the evidence was insufficient to justify the verdict on the 3rd count as to either of the plaintiffs in error, and that the judgment of the imprisonment imposed upon such conviction should be reversed.

---

## IV.

### THE TRIAL COURT COMMITTED ERROR IN ITS RULINGS AS TO THE TAGS FOUND IN THE CASH REGISTER.

During the testimony of H. M. Kupser (Transcript, page 42), one of the prohibition agents who testified on behalf of the government, the following evidence was given:

> "I noticed as the various waiters would come up with their tags, they would have some sort of a tag and would produce it at the cashier's, where he registered it, and the amount was rung up according to what appears on the tag.

The tags were then put in the cash register. I got some of these tags which were in the bundle in the cash register. I did not put any mark on them, I put no identification marks on them. I believe they were turned over to Mr. Shaen; that is, after we arrived back at the Agent's office they were put in his desk.

Thereupon the United States Attorney offered the said tags in evidence; the two offered read as follows:

'Gianduja, Waiter No. 10, Check No. 24. Number of persons. 2 Cafe Royal $1. 1 whisky, 74 cents. 2 Wine, 50 cents, $2.25. War Tax, 10 cents. $2.35.

Gianduja Restaurant, Waiter No. 10, check No. 36. Short 25 cents. 2 Cafe Royal $1. 2 whiskey $1.25. 1 wine 25. Total, $250.'

To the introduction of this evidence counsel for the defendant then and there objected upon the grounds that there was no means of identifying the said tags and that the same were not taken pursuant to a search-warrant.

The COURT (Transcript, p. 41). You cannot raise that question here in the middle of the trial. There is a time and place to try that issue. You cannot try it here now.

Mr. TRAMUTOLO. Here is our situation——

The COURT (interrupting). I do not care to hear about it from you now. I am quite familiar with the law, and have been quite lenient with defendants in enforcing it.

Mr. TRAMUTOLO. We are trying a collateral matter here as to checks that were found there.

The COURT. We are not trying any collateral matter. These men are charged with the sale of liquor. They say they did not sell the liquor there. In their cash register is found a check which on its face purports to be a check for the sale of whiskey and the sale of wine. The defendants can make such explanation about that as they desire later on.

To this ruling of the court counsel for the defendants then and there duly excepted."

This ruling of the court was manifest error. If it had been shown that the two tags which were introduced in evidence were issued on the night in question, it would, of course, have been proper to admit them. But under the circumstances no proper foundation had been laid for their introduction. It was not shown when the tags were issued or when the sales were made. The testimony of the witness shows that they were part of a bundle of tags found in the cash register, which might for all that appears to the contrary have been there for five years. According to the testimony given by the defendants the tags in question were old tags which had been retained because of some mistake made by the waiters, and which had been kept in the register since a time ante-dating the enactment of the National Prohibition Act. No foundation having been properly laid for their introduction the admission of these tags was error highly prejudicial to the defendants in that it created an inference that they were making a busines of illegally selling whiskey. It should require little argument to point out the obvious absurdity of the theory that a restaurant keeper violating the National Prohibition Act would keep documentary evidence of his crimes in his own cash register. In any event it was manifestly error to the defendants to deny their effort (page 86 of Transcript) to introduce all of the tags of July 22 and 23, the days on which the defendants were

charged with violating the law. The Government certainly had no right to take two tags of a designated day, which might have been before the enactment of the Prohibition Act, and seek to charge the defendants with a violation of the law. It was likewise doubly unfair to deny the defendants the right to introduce in evidence all of the tags in the cash register which were issued on the two days mentioned in the information, in order to show that there was no record of any sales of liquor.

---

## V.

### THE LANGUAGE OF THE TRIAL JUDGE WAS PLAIN ERROR.

We have set forth in the second sub-division of this brief the language used by the trial judge in the introductory portion of his charge to the jury. This language was highly objectionable and was palpably prejudicial to the defendants. The trial judge told the jury in substance that the calendar of the court was overcrowded, that there were some three hundred defendants waiting trial for alleged violations of the Prohibition Act and that unless they convicted guilty men, the result would be "that we will never get through". He furthermore told the jury that men who violated the Prohibition Act did so "because they make money out of it" (Transcript, pages 90-91).

This language of the trial judge amounted to a statement that the defendants were guilty and that

> action. Where the line must be drawn between comment upon the evidence of fact which is and that which is not permissible is determined only by an examination of the language and a consideration of the circumstances of each particular case."

In the case of Starr v. U. S. 153 U. S. 614, the late Chief Justice Fuller, in commenting upon an objectionable charge by the trial judge as to the necessity of enforcing the law, says:

> "Whatever special necessity for enforcing the law in all its rigor there may be in a particular quarter of the country, the rules of which and the manner in which the administration of justice should be conducted are the same everywhere, *and argumentative matter of this sort should not be thrown into the scales by the judicial officer who holds them*" (italics ours).

In this case, the trial judge by telling the jury that the court would never get through with its work and that the acquittal of a guilty man encouraged others to commit the same offense informed the jury in substance that they should find the defendants guilty. Such a charge violates the fundamental and constitutional right of the defendant to the honest and conscientious verdict of the jury influenced by improper suggestions or insinuations or coercive words by the trial judge. It has also been held that a judgment of conviction will be reversed for conduct by the trial judge calculated to produce in the minds of the jury the impression that the judge has a fixed opinion that the defendant is guilty and should be convicted.

Adler v. U. S., 104 C. C. A. 608.

Another recent case also holds that where the evidence in a criminal prosecution is sharply contradictory, it is peculiarly essential that in charging the jury there should be freedom from error.

Erhardt v. U. S., 268 Fed. 326.

It is respectfully submitted that for the errors herein complained of the judgment should be reversed.

Dated, San Francisco,
October 3, 1921.

CHAUNCEY F. TRAMUTOLO,
*Attorney for Plaintiffs in Error.*

No. 3679

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

---

LOUIS CABIALE and ANDREW DONIZELLO,

*Plaintiffs in Error,*

vs.

THE UNITED STATES OF AMERICA,

*Defendant in Error.*

---

# BRIEF FOR DEFENDANT IN ERROR

---

JOHN T. WILLIAMS,
*United States Attorney.*
THOMAS J. SHERIDAN,
*Assistant United States Attorney.*
*Attorneys for Defendant in Error.*

Neal, Stratford & Kerr, S. F. 16770

FILED
OCT 1 1 1911
F. D. MONCKTON

No. 3679

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

---

LOUIS CABIALE and ANDREW DONIZELLO,

*Plaintiffs in Error,*

vs.

THE UNITED STATES OF AMERICA,

*Defendant in Error.*

---

# BRIEF FOR DEFENDANT IN ERROR

## A.

## STATEMENT OF THE CASE.

The plaintiffs in error, together with certain other persons, were charged with certain offenses in an information of eleven counts filed in the District Court of the Northern District of California. Plaintiffs in error were convicted upon certain counts, including the third count in which it was charged that they and the other defendants on July 22, 1920, at 1549 Stockton Street, in San Francisco, and within the jurisdiction of the Court,

> "did then and there unlawfully, willfully and knowingly in violation of Section 3, Title II of the Act of October 28, 1919, known as the National Prohibition Act, sell certain intoxicating liquor, to wit, claret wine, containing one-half of one per cent or more of alcohol by volume and then and there fit for use for beverage purposes. That the sale of the said intoxicating liquor by the said defendants at the time and place aforesaid was then and there prohibited and unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to-wit, the 'National Prohibition Act.' "

They were also convicted upon two other counts charging unlawful possession of intoxicating liquors, and the defendant Donizello was also convicted on the ninth and tenth counts, charging the unlawful furnishing of intoxicating liquors. The two plaintiffs in error so convicted were sentenced to be imprisoned in the county jail for six months.

The testimony shows generally that at the times in question the defendants Cabiale and Donizello conducted a restaurant at No. 1549 Stockton Street, San Francisco, known as the Gianduja Restaurant; that on July 22, 1920, a prohibition enforcement agent went to the restaurant and called for and was served with wine at one of the tables therein. On the following evening he made another similar purchase just before the place was raided by several enforcement agents and a considerable quantity of liquors seized and taken away. The testimony ap-

pearing in the transcript from pages 29 to 89, is too voluminous to be quoted or summarized here. It will be referred to in more detail in connection with the discussion of subdivision III of the brief of plaintiffs in error, wherein they challenge the sufficiency of the evidence.

The points relied on for reversal are five, which, stated briefly, are:

1. Insufficiency of Count III of the Information.

2. That the rule against splitting one transaction into several offenses was violated.

3. Insufficiency of the evidence to justify the verdict.

4. Error in receiving in evidence certain incriminatory tags; and

5. Error of the Court in giving a certain general charge in regard to the necessity for the enforcement of law, etc.

## B.

## ARGUMENT.

### I. THE THIRD COUNT OF THE INFORMATION WAS SUFFICIENT.

It is pointed out that the judgment necessarily depends upon the validity of the third count of the Information in that the remaining counts on which convictions were had would not authorize the penalty of imprisonment, and since the third count,

if valid, would authorize the six months penalty imposed that alone need be considered.

An argument is adduced to show that had Congress made it unlawful to make any kind of a sale of intoxicating liquor, it would have been in excess of its power under the Eighteenth Amendment. But since it is conceded that the Volstead Act does not make all such sales of liquor invalid, the authorities so cited need not be considered. It is complained that it is not charged in the particular count that the liquor was sold for beverage purposes, and that, the averment being construed against the pleader, it must be presumed that it was not sold for beverage purposes. This argument gives no consideration to the provisions of Section 32 of the National Prohibition Act providing as follows:

> "Sec. 32. In any affidavit, information, or indictment for the violation of this Act, separate offenses may be united in separate counts and the defendant may be tried on all at one trial and the penalty for all offenses may be imposed. It shall not be necessary in any affidavit, information, or indictment to give the name of the purchaser or to include any *defensive negative averments,* but it shall be *sufficient* to *state* that the act complained of was then and there *prohibited* and *unlawful,* but this provision shall not be construed to preclude the trial court from directing the furnishing the defendant a bill of particulars when it deems it proper to do so."

The information clearly measures up to the requirements of that section. It is distinctly averred therein that the sale of intoxicating liquor by the defendant at the time and place alleged "was then and there prohibited and unlawful." This averment would exclude the possible presumption that the liquor was sold for a proper or innocent purpose. An analogous statute providing for an almost identical rule of pleading is the Harrison Narcotic Act and effect has been given to such a statute in the following cases:

> *Fyke v. United States,* 254 Fed. 225, 228;
> *Melanson v. United States,* 256 Fed. 783, 785;
> *Rothman v. United States,* 270 Fed. 31;
> *Wallace v. United States,* 243 Fed. 300, 305.

The argument of plaintiffs in error is not directed to the insufficiency of the information as viewed in the light of this phase of the statute. But it was held in the Fyke case, supra, that there was no constitutional objection to that character of legislation, the court saying in that behalf:

> "We can not agree with the contention that Amend. Art. 6 of the Federal Constitution would prevent Congress from so enacting. An indictment, tho it failed to exclude defendant from the excepted classes, would sufficiently inform him of the nature of the accusation against him."

It is further said that the third count does not show but that defendant may have had a permit authorizing them to sell liquor; that the exception must

be negatived. But the exception has been negatived in the manner pointed out by the Act in that it is alleged that the sale was "prohibited and unlawful." The language of this Court in Young v. United States, 272 Fed. 967, in referring to a prosecution under the same Act, is pertinent in that behalf, to-wit:

> "The charge follows the language of the statute with sufficient description to inform the defendant of the nature of the offense charged and the cause of the accusation, and with such certainty that he could prepare his defense and plead the judgment in bar of any subsequent prosecution for the same offense. This is sufficient. United States v. Simmons, 96 U. S. 360, 24 L. Ed. 819."

## II. NEITHER VERDICT NOR JUDGMENT WAS AGAINST LAW.

In this subdivision of their brief, plaintiffs in error complain that their alleged offense was split up improperly into several distinct crimes and such acts stated in subsequent counts of the indictment and thus their rights were violated. The argument in this paragraph is meager and does not contain an analysis of the voluminous testimony to show that this complaint is well founded, nor is there citation of authority, either to illustrate the argument or substantiate the point. But since it is manifest that the third count is good, and sufficient alone to support the judgment or sentence imposed, the remain-

ing counts whether sufficient or insufficient, valid or invalid, may be disregarded.

*Claasen v. United States*, 142 U. S. 140, 35 L. Ed. 966;

*Doe v. United States*, 253, Fed. 903, 904.

## III. THE EVIDENCE IS AMPLY SUFFICIENT TO JUSTIFY THE VERDICT OF GUILTY ON THE THIRD COUNT RENDERED AGAINST BOTH PLAINTIFFS IN ERROR.

It is complained that the evidence fails to show a sale of liquor by either of the defendants. It may be pointed out in the beginning that the defendants are not in a position to raise this question, in that they did not move for a directed verdict at the close of the testimony. It appears (Tr. p. 63) that counsel so moved at the end of the Government's case, but the motion having been denied, it was not thereafter renewed, although eleven witnesses thereafter testified for the defendants and four testified for the Government in rebuttal. In such a situation the defendants are not entitled to question the sufficiency of the evidence.

*Clark v. U. S.* 245 F. 112.

But if the question could be raised, the evidence is amply sufficient to show an unlawful sale of claret wine by the two plaintiffs in error and this on July 22 and also on July 23, 1920. Of course, it would be sufficient in support of the count to show a sale on either date. A sale is amply proven by the

testimony of witness Poultney. Besides testifying as indicated on pages 12 and 13 of the defendants' brief wherein he states that he went to the restaurant on July 22, spoke to Mr. Cabiale, told him he had come down for a little something to eat and to get something to drink, and he, Cabiale, said "that was all right he could have what he wanted." Cabiale thereupon ushered him to a seat and took his order and subsequently he was served by a waiter. He gave his order for eats and drinks to Cabiale, it further appears that Cabiale and Donizello were the owners and in charge of the restaurant, and that they were present. And same witness further states on page 32: "I say that Mr. Cabiale, one of these defendants, took my order. I am positive that I asked him for claret. I did not procure any liquor on the evening of the 22nd other than those four glasses of claret." And it appeared that on having given his order to Cabiale, whatever it was, he was subsequently served by a waiter and served with claret. A portion of the claret was taken away and shown to be fit for a beverage and containing forbidden percentages of alcohol. On the following evening, Friday, July 23d, the same witness went to the restaurant and ordered and was served first with claret and then with cocktails, and a portion of the claret and cocktails were taken by the officers in the subsequent raid. When Poultney was served with the liquors, as he states on July 23rd, the other officers of the Government raided the place.

At that time it seems the place was full of patrons—some witnesses estimate that one hundred and fifty people were there, and witness states that as soon as the officers came in, the waiters were running through the place saying, "Throw your wine away, the place is being raided; drink up your wine quick." Other waiters were seen carrying trays with what appeared to be wine and some of them on being accosted threw the liquor into the air. Witnesses identified Cabiale as being there on Friday evening, for example, the witness Kupser (Tr. p. 42). As for Donizello, he admitted in testifying in his own behalf that he was one of the owners of the restaurant; that he was in the restaurant on Friday evening, July 23rd, and that he was taking care of the cash register, as the witness Kupser states. Donizello further admitted on cross examination (Tr. p. 82), "As proprietor I have supervision of the service that is made to patrons. When I have time I go through the dining room and various places to see that patrons are served. I know what patrons receive by way of service in my restaurant. Whatever may be served is served with my knowledge and authority." This testimony should be considered with the testimony of the officers that they seized a large quantity of liquor from the several tables, which, upon being examined, showed a forbidden alcoholic content, and that the liquor was quite visible. It does not appear that there was any particular concealment. While Donizello admits his presence on Friday evening, he was also

shown to be there on the previous evening. As Poultney states (Tr. p. 34), "Aside from Coppola, Cabiale and Donizello I do not recognize any of the other five defendants. On Thursday night I saw Mr. Cabiale and the *gentleman behind him;* on Friday night I saw Mr. Cabiale and *the gentleman behind him* and the other gentleman, Mr. Coppola. The Bill of Exceptions does not formally identify the person described as "the gentleman behind him," but the jury were able to make this identification, and we have the statement of defendants' counsel in making a motion to the Court which fixes the identifications (Trans. p. 65), speaking of the witness Poultney, he states: "He testified that on Thursday night he saw Cabiale there, the gentleman who is seated right behind here, and *the gentleman behind him,* Mr. Donizello. The presumptions in this matter being with the Government and it being incumbent upon plaintiffs in error to show error, the record is insufficient to show that Poultney did not identify Donizello as being present on Thursday evening. Donizello admits that he was present on Friday evening, and it being shown to the jury that both defendants were owners and managers, were actually present in superintending the management and in conducting the business, one actually participating in taking an order for claret, and that both partners could clearly see that liquors were being used and dispensed by the waiters and were paid for at the cashier's desk to Donizello himself, the jury could not have done otherwise than find the defendants guilty.

As to the suggestion that the testimony shows that the case was within the rule of "agent provocateur," little need be said. The two lines of cases on this subject are well understood. It is undoubted that the line of cases of which *Woo Wai v. United States*, 223 Fed. 415, is a type, state a well settled rule. On the other hand, there is a line of cases of which

> *Rothman v. U. S.* 270 F. 31, 34;
> *Ramsey v. U. S.* 268 F. 825, 827;
> *Farley v. U. S.* 269 F. 721, 725.

are types, which equally support a doctrine more applicable to the case here, which is to the effect that where the agents of the Government have reason to believe that the law is being violated, especially where the defendants have formed a system of violating the law continuously, the officers have the right and duty of offering their patronage or requesting service or purchasing contraband liquors, as the case may be, to enable them to learn of the customary activities of the defendant and thus vindicate the law. Where a restaurant is conducting a flourishing business and selling liquors to all comers, as shown here, it is not at all a case of an unlawful entrapment for a Government agent to offer to patronize the business and thus secure evidence of the unlawful course of dealing. When Cabiale was asked to serve the claret, it appears that he was quite ready to serve it and had a supply on hand; but he could not have had such supply on hand unless he had previously

violated the law. The case is clearly of the type of the line of cases last above cited.

Little need be said as to counsel's theory that neither Cabiale nor Donizello are liable because their employees may have acted independently without their direction; that if the waiters sold wine contrary to their wishes they would not be liable. But the cases cited contain the concession that this authority may be express or implied. Manifestly in the case at bar if not expressed it was implied. The proprietors were actually present and even if blind could not have been ignorant of the fact that the wine was flowing freely and that revenues obtained from the sale thereof were coming into their own coffers, as was at times even indicated by the telltale tags. The evidence is amply sufficient to justify the verdict as against the two convicted defendants.

## IV. THE TAGS FOUND IN THE CASH REGISTER OF PLAINTIFFS IN ERROR AT THE TIME OF THE RAID WERE PROPERLY RECEIVED IN EVIDENCE: THEY WERE NOT SUBJECT TO THE OBJECTION MADE BY THE DEFENDANTS.

As pointed out, the plaintiffs in error conducted a restaurant, and it was shown that they had a cash register near the front entrance, which was in charge of defendant Donizello. As previously arranged, Officer H. M. Kupser, who testified for the Government, was instructed to take his position near the cash register where the checks were paid, and he

there received and took charge of liquors which were taken from various portions of the restaurant (Trans. p. 39). He testified (Trans. p. 40):

> "I noticed as the various waiters would come up with their tags, they would have some sort of a tag and would produce it at the cashier's, where he registered it, and the amount was rung up according to what appeared on the tag. *The tags were then put in the cash register. I got some of those tags* on that evening. *These are some of those tags* which were in the bundle in the cash register."

The witness believes they were turned over to Mr. Shaen after they arrived back at the Agent's office. The record continues: Thereupon the United States Attorney offered *the said tags* in evidence; the two offered read as follows:

> "Gianduja Restaurant, Waiter No. 10, Check No. 24. Number of persons. 2 Cafe Royal $1. 1 Whiskey, 74 cents. 2 Wine, 50 cents, $2.25. War tax, 10 cents. $2.35."
>
> "Gianduja Restaurant, Waiter No. 10, Check No. 36. Short 25 cents. 2 Cafe Royal $1. 2 Whiskey $1.25. 1 wine 25. Total $2.50."

The record then proceeds:

> "To the introduction of this evidence counsel for the defendant then and there objected upon the grounds *that there was no means of identifying the said tags and that the same were not taken pursuant to a search-warrant.*"

The court overruled the objection and counsel excepted. It is not clear what was meant or would be implied from that portion of the objection that "there was no means of identifying the said tags." Manifestly there were means. It is not an objection that the proposed exhibit would be irrelevant, nor that there was not proper foundation laid for the offer. If such objection were meant, it is clear that when the witness states that he watched the course of business and saw the various waiters bring up tags, have them registered, the tags then put in the cash register, and that he "got some of *those tags,*" and that "*these are some of those tags* which were in the bundle in the cash register," when the Government offered "*the said* tags in evidence," the proper foundation was laid. It is easy to divine from the record, however, that counsel, as well as the Court, had principally in mind the latter portion of the objection, to wit, that they were not taken pursuant to a search warrant. This objection is not now pressed. Manifestly it could not be in view of the fact that it is stated by one of the Government Agents (Trans. p. 31) that a search warrant was procured for the purpose of searching the place. The record does not disclose either the contents or tenor of this search warrant nor the inventory or return that was made thereon. In the absence of such showing the presumptions would be with the Government. If, on the other hand, the incriminatory tags were made at the time of the raid and thus would not probably be described in the search warrant, plaintiffs would

be impaled upon the other horn of the dilemma in that the tags were an element of the crime, then and there being committed, and for which plaintiffs in error were arrested and the tags could have been and were properly seized as an incident to a lawful arrest.

*Weeks v. United States*, 232 U. S. 383, 58 L. Ed. 652, 655;

1 *Bish. Crim. Proc.* Sec. 211.

The Court was also justified in refusing to entertain the objection that the tags were taken without a proper search warrant in that it was not proper to raise that collateral issue without notice in the middle of the trial.

*Adams v. New York*, 192 U. S. 585, 48 L. ed. 575.

If there be exceptions to this rule, they are cases where the facts are so far conceded as to dispense with the necessity of a trial of a collateral issue. In other words, a situation where a mere statement of the transaction shows that there was a violation of the Fourth Amendment. It is very clear that we have not such a case here.

## V. THE LANGUAGE OF THE TRIAL JUDGE IN HIS GENERAL INSTRUCTIONS WAS NOT IMPROPER: IT WAS EMINENTLY APT AND A WISE OBSERVATION UNDER THE CIRCUMSTANCES.

Exception is now taken to a certain portion of the general charge of the trial judge given at the trial

which is quoted at page 5 of counsel's brief and appears beginning at page 89 of the transcript. But the criticisms are rather belated, for, at the time the general charge was given, no exception whatever was taken thereto. (Tr. pp. 89-98). Counsel was apparently so well satisfied that he did not except to or request any modification of the language now complained of. Later at the time he petitioned for a writ of error and filed assignments of error he had not even then conceived that the charge was in such respect subject to criticism, for it is not specified as one of the assignments of error. Subsequently, some change came over his views and he now strongly animadverts as against the particular language used. At the threshold we object to the consideration of the point for the reason that under the well settled rule no general exception to such a charge can be allowed in a Bill of Exceptions, nor can any exception to a portion of the charge be afterwards urged unless it is taken before the jury retires. It is also true that counsel are confined in their argument to their assignments of error filed with the petition for a writ of error. The latter may not be a hard and fast rule, for under the rule the Court may notice a *plain* error unassigned. But the necessity for an exception to the charge has a more fundamental basis in its support, for, if counsel at the time the charge was given had indicated by either exception or objection to the trial Judge that his language was deemed unfair or coercive, he could readily, if the point were well

taken, have altered the language and given the necessary cautionary admonitions to the jury before it retired. Failing such exception or objection, counsel is now conclusively presumed to have accepted the charge as being entirely fair and proper.

> *Allis v. United States*, 155 U. S. 117, 123; 39 L. Ed. 91, 93.

But if the matter were open to consideration, there is nothing in the charge that can be reasonably excepted to. It appears that the trial was the first of the term and the Court anticipating that the jury would be present for the term conceived it to be beneficial and to be its duty to state to the jurors some general observations regarding their duties as jurors, and did so in the first few paragraphs of the charge. The statements were avowedly general and not made with reference to the particular case. The jurors were told at the threshold that "the jury are the sole judges of the facts." They were admonished as to the duty of law enforcement and told that whether defendants in general awaiting trial were guilty or innocent was to be determined by each jury as the facts were presented. They were given to understand that the acquittal of a man who is guilty encourages violations of the law and that the assistance of the jury is required in law enforcement. There can be no criticism of these general observations, and that they were intended to be general and not to have

reference to the particular case appears patently from the charge. Having so discussed the situation, the Court expressly declares "Now that brings us to a consideration of the case itself." Thereupon the Court delivered a general charge which was not excepted to, and in which with great ability and signal care guarded all possible rights of the defendants; the jury were expressly told (p. 97) that "It is for the jury to determine whether any of these defendants are guilty," and also "The defendants in this case, as in any case upon trial in this Court for a criminal offense, are presumed to be innocent, and that assumption attaches at the commencement of the trial and remains with them until the jury have determined otherwise by their verdict if they so determine, "and the jury should not so determine unless they are satisfied of the guilt of the defendants beyond a reasonable doubt." That the charge was entirely proper and could not have violated any rights of the defendants is clear from the authorities.

*Allis v. U. S.,* 155 U. S. 117, 123; 39 L. ed. 91, 93.

*Simmons v. U. S.* 142 U. S. 148; 35 L. ed. 968.

*Keller v. U. S.* 168 Fed. 697.

*Savage v. U. S.* 270 Fed. 14, 21;

*Horning v. District of Columbia,* 253 U. S. ——; 65 L. ed. ——;

Adv. Opinions, 64.

We confidently urge that the conviction of plain-

tiffs in error be upheld and that the judgment be affirmed.

Respectfully submitted,

JOHN T. WILLIAMS,
*United States Attorney,*

THOMAS J. SHERIDAN,
*Assistant U. S. Attorney,*
*Attorneys for Defendant in Error.*

No. 3681

# United States
# Circuit Court of Appeals
## For the Ninth Circuit.

C. HENRY SMITH,

Plaintiff in Error,

vs.

A. O. LINDVIG,

Defendant in Error.

# Transcript of Record.

**Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.**

FILED
MAY 14 1921
F. D. MONCKTON,
CLERK

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3681

# United States

# Circuit Court of Appeals

## For the Ninth Circuit.

C. HENRY SMITH,

Plaintiff in Error,

vs.

A. O. LINDVIG,

Defendant in Error.

# Transcript of Record.

**Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.**

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]


Page

Amended Answer to Complaint..... 15

Assignment of Errors and Prayer for Reversal. 228

Bill of Exceptions, Engrossed ..... 24

Bill of Particulars ..... 3

Bond on Writ of Error..... 251

Certificate of Clerk U. S. District Court to Record on Writ of Error..... 253

Certificate of Judge to Bill of Exceptions..... 226

Citation on Writ of Error..... 257

Complaint ..... 1

Engrossed Bill of Exceptions ..... 24

Exceptions to Alleged Bill of Particulars, Notice of Motion to Strike Same from the Files, and Notice of Motion for Further Bill of Particulars. ..... 11

EXHIBITS:

Exhibit "D"—Unsigned Letter Dated January 16, 1915, to A. O. Lindvig..... 202

Exhibit "E"—Letter Dated February 8, 1915, A. O. Lindvig to C. Henry Smith, Inc. ..... 204

Exhibit "F"—Unsigned Letter Dated December 28, 1915, to A. O. Lindvig.... 205

Index. Page

EXHIBITS—Continued:

Exhibit "G"—Letter Dated May 3, 1917, A. O. Lindvig to C. Henry Smith..... 208

Exhibit "H"—Unsigned Letter Dated June 28, 1917, to A. O. Lindvig..... 210

Plaintiff's Exhibit No. 1—Supplementary Account Dated July 14, 1917, Rendered A. O. Lindvig by C. Henry Smith..... 146

Plaintiff's Exhibit No. 2—Supplementary Account Dated July 16, 1917, Rendered A. O. Lindvig by C. Henry Smith.... 148

Plaintiff's Exhibit 3—Statement of Account Dated October 15, 1917, Rendered A. O. Lindvig by C. Henry Smith..... 150

Plaintiff's Exhibit 4—Final Statement of Account — Supplementing Statement Dated October 15, 1917, Rendered A. O. Lindvig by C. Henry Smith..... 154

Plaintiff's Exhibit 5—Statement of Account Substituted for Statement Dated October 15, 1917, Rendered A. O. Lindvig by C. Henry Smith ..... 158

Plaintiff's Exhibit 7—Excerpt from Bill of Lading for Voyage No. 1 of "Regulus" 199

Plaintiff's Exhibit 8—Excerpt from Bill of Lading for Voyage No. 2 of "Regulus" 199

Plaintiff's Exhibit 9—Excerpt from Letter Dated November 10, 1917, A. O. Lindvig to C. Henry Smith ..... 201

Plaintiff's Exhibit 10—Letter Dated July 18, 1917, A. O. Lindvig to C. Henry Henry Smith ..... 70

Index. Page

EXHIBITS—Continued:
Plaintiff's Exhibit 11—Letter Dated November 8, 1917, C. Henry Smith to A. O. Lindvig ..... 73
Plaintiff's Exhibit 11—Unsigned Letter Dated November 8, 1917, to A. O. Lindvig ..... 171
Plaintiff's Exhibit 13—Statement of Salvage— S. S. "Sinaloa" ..... 173
Plaintiff's Exhibit 16—Bills of Lading.... 165
Defendant's Exhibit "JJ"—Night Letter Dated March 8, 1917, C. Henry Smith Inc. to United States Shipping Board. 56
Defendant's Exhibit "KK"—Telegram Dated March 10, 1917, United States Shipping Board to C. Henry Smith, Inc. ..... 57
Defendant's Exhibit "LL"—Telegram Dated March 12, 1917, C. Henry Smith, Inc. to William Denman..... 58
Defendant's Exhibit "MM"—Telegram Dated March 12, 1917, Chairman United States Shipping Board to C. Henry Smith ..... 59
Defendant's Exhibit "NN"—Telegram Dated March 14, 1917, C. Henry Smith, Inc. to William Denman..... 60
Defendant's Exhibit "OO"—Cablegram Dated March 16, 1917, C. Henry Smith to S. Lindvig..... 60
Defendant's Exhibit "PP"—Letter Dated

Index.

Page

EXHIBITS—Continued:

March 29, 1917, C. Henry Smith, Inc. to United States Shipping Board..... 61

Defendant's Exhibit "QQ"—Telegram Dated March 29, 1917, United States Shipping Board to C. Henry Smith... 62

Defendant's Exhibit "RR"—Cablegram Dated March 29, 1917, C. Henry Smith to S. Lindvig ..... 63

Defendant's Exhibit "SS"—Cablegram Dated March 29, 1917, C. Henry Smith to S. Lindvig ..... 63

Defendant's Exhibit "TT"—Letter Dated April 24, 1917, C. Henry Smith to A. O. Lindvig ..... 67

Defendant's Exhibit "VV"—Statement of Account Dated June 1, 1917, Rendered by C. Henry Smith, Inc. to A. O. Lindvig ..... 65

Defendant's Exhibit 4–G—Contract Dated September 19, 1916, Between Ynchausti y Cia and A. O. Lindvig..... 96

Defendant's Exhibit 4–O—Letter Dated October 24, 1917, A. O. Lindvig to C. Henry Smith ..... 170

Defendant's Exhibit 4–Q—Excerpt from Letter Dated October 27, 1917, B. Lindvig to C. Henry Smith ..... 125

Defendant's Exhibit 4–S—Contract Dated July 10, 1917, Between C. Henry Smith and E. I. Dupont de Nemours & Co..... 119

Index. Page

EXHIBITS—Continued:
Defendant's Exhibit No. 4–Z—Unsigned Letter Dated October 31, 1917, Addressed to Captain P. Hosvlef ..... 111
Defendant's Exhibit No. 5–A—Unsigned Letter Dated October 6, 1917, Addressed to A. O. Lindvig..... 112
Defendant's Exhibit No. 5–B—Letter Dated October 12, 1917, A. O. Lindvig to C. Henry Smith ..... 189
Defendant's Exhibit No. 5–D—Unsigned Letter Dated November 21, 1917, Addressed to A. O. Lindvig..... 115
Defendant's Exhibit No. 5–F—Unsigned Letter Dated July 11, 1917, Addressed to W. A. Simonton ..... 117
Defendant's Exhibit 50—Report for the Year 1917 Rendered Bjarne Lindvig by A. O. Lindvig ..... 78
Judgment on Verdict ..... 23
Names and Addresses of Attorneys of Record. 1
Order Allowing Writ of Error and Fixing Amount of Bond ..... 250
Order Denying Motion to Strike Out Bill of Particulars, etc. ..... 14
Order Extending Time to and Including February 10, 1920, Within Which to File Record and Docket Cause. ..... 259
Order Extending Time to and Including March 10, 1920, Within Which to File Record and Docket Cause ..... 260

Index. Page

Order Extending Time to and Including April 10, 1920 Within Which to File Record and Docket Cause ..... 261
Order Extending Time to and Including May 10, 1920, Within Which to File Record and Docket Cause ..... 262
Order Extending Time to and Including June 10, 1920, Within Which to File Record and Docket Cause ..... 263
Order Extending Time to and Including July 10, 1920, Within Which to File Record and Docket Cause ..... 264
Order Extending Time to and Including August 10, 1920, Within Which to File Record and Docket Cause ..... 265
Order Extending Time to and Including September 10, 1920, Within Which to File Record and Docket Cause ..... 266
Order Extending Time to and Including October 9, 1920, Within Which to File Record and Docket Cause ..... 267
Order Extending Time to and Including November 9, 1920, Within Which to File Record and Docket Cause ..... 268
Order Extending Time to and Including December 5, 1920, Within Which to File Record and Docket Cause ..... 269
Order Extending Time to and Including January 8, 1921, Within Which to File Record and Docket Cause ..... 270

Index. Page

Order Extending Time to and Including February 8, 1921, Within Which to File Record and Docket Cause ..... 271
Order Extending Time to and Including March 8, 1921, Within Which to File Record and Docket Cause ..... 272
Order Extending Time to and Including April 8, 1921, Within Which to File Record and Docket Cause ..... 273
Order Extending Time to and Including April 21, 1921, Within Which to File Record and Docket Cause ..... 274
Order Extending Time to and Including April 26, 1921, to File Record and Docket Cause.. 275
Order Extending Time to and Including May 4, 1921, to File Record and Docket Cause.... 276
Order Extending Time to and Including May 10, 1921, to File Record and Docket Cause.. 278
Order Granting Plaintiff's Motion for an Instructed Verdict, etc. ..... 22
Petition for Writ of Error..... 227
Praecipe for Record on Writ of Error..... 252
Return to Writ of Error..... 256
TESTIMONY ON BEHALF OF DEFENDANT:
BISHOP, JOHN A. ..... 126
Recalled ..... 143
DOELKER, FRED L..... 136
Cross-examination ..... 138
McCLELLAND, JOHN ..... 133
Cross-examination ..... 135

Index. Page

TESTIMONY ON BEHALF OF DEFENDANT—Continued:
PAGE, WILFERT ..... 131
SMITH, C. HENRY ..... 25
Recalled ..... 142
WALLACE, FRED W. ..... 141
Verdict ..... 22
Writ of Error ..... 254

**Names and Addresses of Attorneys of Record.**

Messrs. ANDROS & HENGSTLER, Kohl Building, San Francisco, and

Messrs. GOODFELLOW, EELLS, MOORE & ORRICK, Insurance Exchange Building, San Francisco,

Attorneys for Plaintiff in Error.

Messrs, NATHAN H. FRANK and IRVING H. FRANK, Merchants Exchange Building, San Francisco,

Attorneys for Defendant in Error.

---

In the District Court of the United States, in and for the Southern Division of the Northern District of California, Division Two.

No. 16,124.

A. O. LINDVIG,

Plaintiff,

vs.

C. HENRY SMITH,

Defendant.

**Complaint.**

Plaintiff complaining of defendant above named, for cause of action alleges:

I.

That at all times hereinafter mentioned said plaintiff was, and still is, a citizen and subject of the Kingdom of Norway, and an inhabitant of the city of Christiania, in said Kingdom of Norway.

II.

That at all times hereinafter mentioned the said

C. Henry Smith, defendant above named, was, and still is, a citizen of the State of California, and an inhabitant of and residing in the city and county of San Francisco, in said state.

III.

That within two years last past defendant collected and received from divers persons certain sums of money for account of the plaintiff, amounting, in excess of all charges and expenses or amounts due said defendant, to the sum of Seventy Thousand Five Hundred Eighty-two and 72/100 (70,582.72) Dollars, no part of which has been paid by defendant to the plaintiff. [1*]

IV.

That before commencing suit herein, plaintiff, at the city and county of San Francisco, State of California, demanded payment of said sum from the defendant.

V.

That defendant has not paid the said sum, nor any part thereof, although the same is due and owing from said defendant to said plaintiff.

WHEREFORE, plaintiff prays for judgment against said defendant in the sum of Seventy Thousand Five Hundred Eighty-two and 72/100 (70,582.72) Dollars, together with interest and costs of suit.

NATHAN H. FRANK,
IRVING H. FRANK,
Attorneys for Plaintiff. [2]

---

*Page-number appearing at foot of page of original certified Transcript of Record.

State of California,
City and County of San Francisco,—ss.

B. Lindvig, being first duly sworn, deposes and says: That the said plaintiff, A. O. Lindvig, is absent from the city and county of San Francisco, and is now a resident of Christiania, in Norway, and is therefore unable to verify this complaint in person, wherefore said B. Lindvig verifies the same in the place and stead; that said B. Lindvig is the attorney in fact of said A. O. Lindvig, and as such is informed of the matters and things in said complaint set forth; that he has read the foregoing complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon information and belief, and that as to those matters he believes it to be true.

B. LINDVIG.

Subscribed and sworn to before me this 15th day of December, 1917.

[Seal] CHARLES EDELMAN,
Notary Public in and for said City and County of San Francisco, State of California.

[Endorsed]: Filed Dec. 17, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [3]

---

(Title of Court and Cause.)

**Bill of Particulars.**

In response to the demand for a bill of particulars in the above-entitled cause, the plaintiff states that

the controversy upon which the complaint is based arises out of transactions, all of the details of which are in the exclusive knowledge of the defendant, and the records of the moneys received are in his exclusive possession; that plaintiff has no knowledge of the accounts except such as is derived from statements of account rendered by the defendant to the plaintiff; that no part of said statements so rendered are in the possession of the plaintiff at Christiania, Norway; that in response to the said demand plaintiff files the following bill of particulars, being the best that he can do at the present time, and that so soon as said plaintiff, or his representatives, are accorded an opportunity to examine the books and papers in the possession of said defendant, he claims the right to amend the following bill of particulars or to extend it in such manner as he may feel warranted, after obtaining the necessary information from the books, accounts, and papers, now in the possession of said defendant.

That on the 21st day of November, 1917, the said defendant rendered to the plaintiff's agent, at San Francisco, California, an account entitled:

> "Corrected Statement, A. O. Lindvig, in A/C C. Henry Smith—Final Statement—Supplementing Statement Dated October 15, 1917."

That in reply thereto the attorney for said plaintiff addressed to said defendant a communciation in the following words and figures: [4]

"November 24, 1917.

C. Henry Smith, Esq.,
311 California Street,
San Francisco, Calif.

Dear Sir:

In re: LINDVIG ACCOUNT.

Respecting the account handed to me on November 21st, 1917, entitled, 'Corrected Statement A. O. Lindvig—Account C. Henry Smith—Final Statement Supplementing Statement dated October 15, 1917,' I have to advise you on behalf of said A. O. Lindvig, and on behalf also of his duly authorized agent, Mr. B. Lindvig, that said statement cannot be accepted as correct in any particular.

Before entering upon further consideration of the details of said account, we respectfully call upon you,

1. For the statement referred to therein under the first item of said account, namely,

'July 20. Balance due C. Henry Smith per corrected statement 9/11/17 ..... $24,108.97'

It may be that you have forwarded this statement to Mr. A. O. Lindvig at Christiania, but you can readily understand that the matter cannot be handled from that end because of the present difficulties of communication. It may be many months before we would be able to receive a copy of that statement from Christiania, and as the matter must be handled at this end, we desire a copy of that statement in order that we may examine the same and determine whether or no the said balance with which

you begin your 'Corrected Statement' is a true balance. [5]

2. We desire, also, the statement referred to in your 'Corrected Statement' as 'Statement dated October 15, 1917,' of which the one you have handed us purports to be a supplement.

It must be apparent to you that we cannot pass intelligently upon a 'Supplement' without having before us at the same time the statement to which the supplement refers.

3. We desire also, all vouchers in your possession necessary to support the above accounts.

Without waiving at the present time our right to question any of the items in your said statement, we wish to call your attention to the following items, which upon their face are entirely inadmissible, namely:

| | |
|---|---|
| A claim for office remuneration re contract hull 154, etc. | $ 10,000.00 |
| Commission Dupont Powder Contract | 25,517.80 |
| Commission on inward freight 'Governor Forbes' | 2,049.65 |
| Commission on purchase 'Governor Forbes | 6,800.00 |
| And your 'Sinaloa' salvage account, which, so far as our present information will permit us to specify, is an overchange of at least, if no more | 3,165.27 |
| E. I. Dupont de Nemours account overpayment freight | 3,119.12 |

Your retention of a balance of which you state is an estimated amount for procuring of bookings or freight ..... 5,000.00

We desire to advise you that the above specifications are made without prejudice to our right to further question the items of the said account, which right we are specifically reserving at the present time.

We also call your attention to the fact that many items in said account rendered us are mere summaries, and [6] refer to other accounts for their details.

We note your suggestion of alleged difficulties experienced by you by reason of your former bookkeeper taking employment with Mr. B. Lindvig, but we cannot concede the claims made by you in this regard. The gentleman referred to has been at your service without reserve, and there is nothing in the account that you now present us which warrants the claim you are making in that behalf.

Neither is it our disposition to argue with you the matters referred to by you under your separate letter entitled 'Re Commissions for procuring Dupont contract,' further than to say that your position is untenable.

Anticipating your prompt compliance with the requests hereinbefore contained,

I remain,

Very truly,

Yours, etc.,

NATHAN H. FRANK."

That thereafter, on December 3d, 1917, the said attorney for said plaintiff supplemented said letter of November 24th, with a letter dated December 3d, 1917, in the words and figures following:

"December 3, 1917.

C. Henry Smith, Esq.,
311 California Street,
San Francisco, Calif.

Dear Sir:

In re: LINDVIG ACCOUNTS.

We have to acknowledge receipt of a letter dated December 1, 1917, addressed to us by Mr. William Denman, as a reply to our communication to you under date of November 24th.

We note therefrom that the account submitted to us under the heading 'Corrected Statement A. O. Lindvig in A/C with C. Henry Smith Final Statement—Supplementing Statement [7] dated October 15, 1917'—is not intended as a supplement to the Statement of October 15th, but as a *substitute* therefor.

In this connection we have to advise you that under date of November 27th, 1917, we received a cable from Mr. A. O. Lindvig in which he states that

'Smith's general statement dated fifteen ten just received but not correct.'

We are making this reference so that you will understand that neither the original nor the substituted statement will be accepted as a correct statement of your account.

We wish, also, to call your attention to your charge of $6,000.00 remuneration for attending to Steamer 'Regulus', which we understand has been heretofore protested by Mr. Lindvig as not allowable, and which protest is now renewed.

In his letter of December 1st, Mr. Deman, referring to the items on page 2 of my letter of November 24th, says:

> 'Do I understand you to dispute these items, or desire a conference upon them, or to deny absolutely liability for them?'

It seemed to us very clear that when, in that connection we said that 'the items upon their face are entirely inadmissible,' that you would understand that we 'deny absolutely liability for them,' but if it was not so understood before, let it be so understood now.

With the data at hand, we figure that you have still in your possession moneys collected by you for and on account of Mr. A. O. Lindvig, belonging to him and which you have refused to pay over, in the amount of $70,582.72, or thereabouts, as we therefore find ourselves on behalf of said A. O. Lindvig, compelled to demand of you the payment of such moneys to his duly authorized agent, Mr. B. Lindvig, No. 280 Battery [8] Street, San Francisco.

A prompt reply to this would be appreciated.

Very truly,

Yours, &c.,

NATHAN H. FRANK."

NHF:CMH.

That the items stated in said two letters, plus

Twelve Thousand Fifty ($12,050) Dollars, for the details of which we have sent to Christiana, and less the item Three Thousand One Hundred and Nineteen and 12/100 ($3,119.12) Dollars, referred to in our letter of November 24th, 1917, are the items which constitute the bill of particulars, amounting to Seventy Thousand Five Hundred Eighty-two and 72/100 ($70,582.72) Dollars, upon which this complaint is based, viz.:

| | |
|---|---|
| In the 3d article of the letter of November 24th, items amounting to..... | $55,651.84 |
| In the letter of Dec. 3d, remuneration for attending to Steamer "Regulus".... | 6,000.00 |
| Items to be received from Christiania.... | 12,050.00 |
| | $73,701.84 |
| Less item in letter of Nov. 24, E. I. Dupont de Nemours account overpayment freight ..... | 3,119.12 |
| Balance ..... | $70,582.72 |

That so soon as further information comes to hand upon the subject, plaintiff will be pleased to supplement this bill of particulars with such further statement as the information referred to may warrant.

Respectfully submitted,
NATHAN H. FRANK,
IRVING H. FRANK,
Attorneys for Plaintiff. [9]

To Messrs. Andros & Hengstler, Substituted for William Denman, Esq., and Denman & Arnold, Attorneys for Defendant:

Please take notice that the foregoing is the "bill of particulars as to the account set forth in the complaint in the above-entitled action" demanded by you on the 19th day of December, 1917.

NATHAN H. FRANK,
IRVING H. FRANK,
Attorneys for Plaintiff.

Service of the foregoing bill of particulars is admitted this 26th day of December, 1917.

ANDROS & HENGSTLER,
Attorneys for Deft.

[Endorsed]: Filed Dec. 29, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [10]

---

(Title of Court and Cause.)

**Exceptions to Alleged Bill of Particulars, Notice of Motion to strike Same from the Files, and Notice of Motion for Further Bill of Particulars.**

To A. O. Lindvig, the Plaintiff Herein, and to Messrs. Nathan H. Frank and Irving H. Frank, His Attorneys:

Now comes the defendant above named, and excepts to the alleged bill of particulars heretofore filed in said cause by plaintiff, upon the grounds hereinafter set forth, and notifies you that upon the same grounds, on Monday, January 7, 1918, at the hour of ten o'clock A. M., or as soon thereafter as

counsel may be heard, in the courtroom of said court, in the city and county of San Francisco, State of California, defendant will move said Court to strike said alleged bill of particulars from the files, and for an order requiring plaintiff to furnish a further and proper bill of particulars. The grounds for said exceptions and said motion are as follows:

1. That the document so filed by plaintiff under the title "bill of particulars" does not constitute in any wise such a bill.

2. That the document so filed is argumentative, irrelevant, and not responsive to defendant's demand for a bill of particulars.

3. That since B. Lindvig, as the authorized agent of plaintiff, has made and filed in said cause an affidavit on attachment wherein it is stated under oath: "That the said defendant in said action is indebted to plaintiff in the sum of $70,582.72, gold coin of the United States, over and above all legal setoffs or counterclaims, upon an implied contract for the direct payment of money, to wit, money collected and received for the account of plaintiff in the sum of $70,582.72, and that said contract is payable in this state," and caused an attachment to be issued and levied upon property of defendant, compelling defendant to file a bond in the sum of $80,000.00 [11] in order to procure the release of same, plaintiff may not avoid or escape furnishing a proper bill of particulars upon the ground that "the controversy upon which the complaint is based arises out of transactions all of the

details of which are in the exclusive knowledge of the defendant, and the records of the moneys referred to are in his exclusive possession."

4. That if said sum of $70,582.72 is ascertained or arrived at or derived from any statement or "statements of account rendered by defendant to plaintiff," then plaintiff should specifically disclose from what statement or statements of account so rendered, said sum of $70,582.72 is derived, and how and in what particular or particulars, if any, such statement or statements are not proper.

5. That since said suit was filed in this District, and the complaint verified by said B. Lindvig, and the affidavit on attachment made by him, it is no answer to the demand for a bill of particulars, and no excuse for failure to furnish same, "that no part of said statements so rendered are in the possession of the plaintiff at Christiania, Norway."

6. That the insertion in said alleged bill of particulars of the two letters from plaintiff's attorneys to defendant, dated respectively November 24, 1917, and December 3, 1917, is in no wise an answer to defendant's demand for a bill of particulars, and is an evasion of the same, and improper in that said letters constitute self-serving declarations upon the part of plaintiff, and do not in any wise tend to make clear the basis for plaintiff's complaint or the grounds upon which said sum of $70,582.72 is alleged to be owing by defendant to plaintiff.

7. That defendant is wholly unable, from the complaint and the alleged bill of particulars filed by plaintiff, to know or ascertain upon what plain-

tiff relies to show the liability of defendant to plaintiff in the sum of $70,582.72, and cannot intelligently or properly or at all answer said [12] complaint or frame an issue or issues in said action which can be properly tried by said Court.

Dated: San Francisco, California, January 3, 1918.

ANDROS & HENGSTLER,
Attorneys for Defendant.

[Endorsed]: Filed Jan. 4, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [13]

---

At a stated term, to wit, the November term, A. D. 1917, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom, in the City and County of San Francisco, on Monday, the 7th day of January, in the year of our Lord one thousand nine hundred and eighteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 16,124.

A. O. LINDVIG
vs.
C. HENRY SMITH.

**(Order Denying Motion to Strike Out Bill of Particulars, etc.)**

Defendant's motion to discharge attachment and motion to make complaint more definite and certain

and motion to strike out bill of particulars, etc., came on to be heard and after arguments were submitted and fully considered and it was ordered that said motions to discharge attachment and to make complaint more certain be and the same are hereby denied and it is ordered that said motion to strike out bill of particulars, etc., be and the same is hereby denied, without prejudice. [14]

---

In the Southern Division of the District Court of the United States, for the Northern District of California.

A. O. LINDVIG,

Plaintiff,

vs.

C. HENRY SMITH,

Defendant.

**Amended Answer to Complaint.**

Now comes the defendant above named, and by leave of Court first obtained, files this his amended answer to the complaint herein, and admits, alleges and denies as follows:

I.

Admits the allegations contained in Articles I, II and IV of said complaint.

II.

Admits that as alleged in the complaint, defendant received for account of plaintiff the sum of $70,582.72, but denies that the same was in excess of all charges and expenses or amounts due de-

fendant, or charges, or expenses or amounts due defendant, and in this behalf defendant alleges:

That within two years prior to the filing of the complaint herein the plaintiff became indebted to the defendant for work, labor and services rendered by the defendant as the agent of the plaintiff, and at his special instance and request, in the amount of $70,582.72, as follows:

One. At the special instance and request of plaintiff, defendant [15] about the 5th of September, 1916, negotiated a contract for the construction of a vessel known as "Hull 154" by the Bethlehem Steel Company, for the price of $775,000, and thereafter and until about the 1st of October, 1917, supervised the construction thereof; that the reasonable value of the services of defendant in this behalf is $10,000, which said sum plaintiff agreed to pay defendant; no part of said sum has been paid.

Two. On the 10th day of July, 1917, at the special instance and request of plaintiff, defendant negotiated and made a contract between plaintiff and Du Pont de Nemours Powder Company for the transportation from the Republic of Chile to San Francisco, California, and elsewhere of 40,000 tons, 10% more or less, of nitrate; that the reasonable value of the services of defendant in this behalf is the sum of $25,410.81, which plaintiff agreed to pay defendant; no part of said sum has been paid, except the sum of $2,482.20.

Three. At the special instance and request of plaintiff, defendant about January 1, 1916, negotiated a contract for the construction of a vessel

known as "Regulus" by the Union Iron Works, for the sum of $450,000, and thereafter and until the 1st day of April, 1917, supervised the construction thereof; that the reasonable value of the services of defendant in this behalf is the sum of $6,000, which plaintiff agreed to pay defendant; no part of said sum has been paid defendant.

Four. At the special instance and request of plaintiff and for and on his behalf, defendant on or about the 8th day [16] of September, 1916, purchased the vessel "Governor Forbes" for the sum of $340,000; that for said services plaintiff agreed to pay defendant the sum of $6,800; no part of said sum has been paid to defendant.

Five. At the special instance and request of plaintiff, defendant for and on behalf of plaintiff, on or about the 20th day of June, 1917, entered into contracts for and on behalf of plaintiff for the salvage of the steamer "Sinaloa"; and thereafter defendant, at the like instance and request of plaintiff, supervised the salvage of said vessel and attended to the repair thereof; that the reasonable value of defendant's services in that behalf is the sum of $3,165.27, which the plaintiff agreed to pay defendant; no part of which said sum has been paid to defendant.

Six. On the 29th day of June, 1914, defendant and plaintiff entered into an agreement in writing, wherein and whereby it was agreed that defendant should receive and retain 5% of the amount of all the freight earned by certain ships owned by plaintiff and operated by defendant for plaintiff; that

5% of the freight earnings of said steamships amounted to a sum far in excess of $21,688.84; that all thereof has been paid defendant except said sum of $21,688.84, no part of which has been paid. That the said amounts so earned by defendant and due him from plaintiff and unpaid, as alleged in subdivisions One, Two, Three, Four, Five and Six hereof, aggregating the sum of $70,582.72, were by defendant deducted from the amounts received by him for account of plaintiff, and were retained by him, and the balance of his collections was [17] remitted by him to plaintiff.

FIRST COUNTERCLAIM.

By way of further defense and counterclaim, defendant alleges that at the special instance and request of plaintiff, defendant about the 5th of September, 1916, negotiated a contract for the construction of a vessel known as "Hull 154" by the Bethlehem Steel Company, for the price of $775,000, and thereafter and until about the 1st of October, 1917, supervised the construction thereof; that the reasonable value of the services of defendant in this behalf is $10,000, which said sum plaintiff agreed to pay defendant; no part of said sum has been paid.

SECOND COUNTERCLAIM.

By way of further defense and counterclaim, defendant alleges that on the 10th of July, 1917, at the special instance and request of plaintiff, defendant negotiated and made a contract between plaintiff and Du Pont de Nemours Powder Company for the transportation from the Republic of Chile to San

Francisco, California and elsewhere of 40,000 tons, 10% more or less, of nitrate; that the reasonable value of the services of defendant in this behalf is the sum of $25,410.81, which plaintiff agreed to pay defendant; no part of said sum has been paid, except the sum of $2,482.20.

THIRD COUNTERCLAIM.

By way of further defense and counterclaim, defendant alleges that at the special instance and request of plaintiff, defendant about January 1, 1916, negotiated a contract for the [18] construction of a vessel known as the "Regulus" by the Union Iron Works for the sum of $450,000, and thereafter and until the 1st day of April, 1917, supervised the construction thereof; that the reasonable value of the services of defendant in this behalf is the sum of $6,000, which plaintiff agreed to pay defendant; no part of said sum has been paid defendant.

FOURTH COUNTERCLAIM.

By way of further defense and counterclaim, defendant alleges that at the special instance and request of plaintiff and for and on his behalf, he purchased the vessel "Governor Forbes" for the sum of $340,000; that for said services plaintiff agreed to pay defendant the sum of $6,800; no part of said sum has been paid to defendant.

FIFTH COUNTERCLAIM.

By way of further defense and counterclaim defendant alleges that at the special instance and request of plaintiff, defendant for and on behalf of plaintiff on or about the 20th day of June, 1917, en-

tered into contracts for and on behalf of plaintiff, for the salvage of the steamer "Sinaloa," and thereafter defendant at the like instance and request of plaintiff supervised the salvage of said vessel and attended to the repair thereof; that the reasonable value of defendant's services in that behalf is the sum of $3,165.27; no part of which said sum has been paid to defendant.

SIXTH COUNTERCLAIM.

By way of counterclaim, defendant alleges that on the 29th day of June, 1914, defendant and plaintiff entered into [19] an agreement in writing, wherein and whereby it was agreed that defendant should receive and retain 5% of the amount of all the freight earned by certain ships owned by plaintiff and operated by defendant for plaintiff; that 5% of the freight earnings of said steamships amounted to a sum of far in excess of $21,688.84; that all thereof has been paid defendant, except said sum of $21,688.84, no part of which has been paid.

WHEREFORE, defendant prays to be hence dismissed with his costs.

ANDROS & HENGSTLER,
GOODFELLOW, EELLS, MOORE & ORRICK,
Attorneys for Defendant.

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

C. Henry Smith, being first duly sworn, deposes and says: That he is the defendant in the above-entitled action; that he has read the foregoing

amended answer to complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information and belief, and as to those matters he believes it to be true.

C. HENRY SMITH.

Subscribed and sworn to before me this 30th day of January, 1919.

[Seal] T. L. BALDWIN,

Deputy Clerk U. S. District Court, Northern District of California.

Service admitted this 30th day of January, 1919.

NATHAN H. FRANK,
Attorney for Plaintiff.

[Endorsed]: Filed Jan. 30, 1919. Walter B. Maling, Clerk. [20]

---

At a stated term, to wit, the March term, A. D. 1919, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Friday, the 13th day of June, in the year of our Lord one thousand nine hundred and nineteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 16,124.

A. O. LINDVIG

vs.

C. HENRY SMITH.

**(Order Granting Plaintiff's Motion for an Instructed Verdict, etc.)**

The parties and the jury being present, the trial was resumed. After further arguments by counsel, plaintiff's motion for an instructed verdict was submitted and being considered it was ordered that the motion be granted and the jury was instructed to return a verdict in form as submitted. Thereupon the following verdict was returned by the jury, namely: "We, the jury find in favor of the plaintiff and assess the damages against the defendant in the sum of Seventy Seven Thousand Nine Hundred Thirty Nine & 00/100 Dollars ($77,939.00). W. C. Graves, Jr. Foreman." To which ruling by the Court and to which verdict, the defendant duly excepted. Ordered that judgment be entered in accordance with said verdict and for costs and that the jury be discharged. Ordered that the defendant may have a stay of execution for thirty days. [21]

---

(Title of Court and Cause.)

**Verdict.**

We, the jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of Seventy-seven Thousand Nine Hundred Thirty-nine and 00/100 Dollars ($77,939.00).

W. C. GRAVES, Jr.,
Foreman.

[Endorsed]: Filed June 13, 1919. Walter B. Maling, Clerk. [22]

---

(Title of Court and Cause.)

**Judgment on Verdict.**

This cause having come on regularly for trial upon the 28th day of May, 1919, being a day in the March, 1919, term of said court, before the court and a jury of twelve men duly impaneled and sworn to try the issues joined herein; Nathan H. Frank, Esq., appearing as attorney for plaintiff and Stanley Moore and L. T. Hengstler, Esqrs., appearing as attorneys for defendant; and the trial having been proceeded with on the 29th day of May and the 3d, 4th, 5th, 6th, 10th, 11th, 12th, and 13th, days of June, all in said year and term, and oral and documentary evidence upon behalf of the respective parties having been introduced and closed; thereupon the plaintiff moved for an order directing the jury to return a verdict in its favor and said motion, after submission, being granted, the jury returned the following verdict which was ordered recorded, namely: "We, the jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of seventy-seven thousand nine hundred thirty-nine and 00/100 dollars ($77,939.00.) W. C. Graves, Jr., Foreman," and the Court having ordered that judgment be entered in accordance with said verdict and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered

by the Court that A. O. Lindvig, plaintiff, do have and recover of and from C. Henry Smith, defendant, the sum of Seventy-seven Thousand Nine Hundred Thirty-nine and 00/100 ($77,939.00) Dollars together with his costs herein expended taxed at $471.25.

Judgment entered June 13, 1919.

WALTER B. MALING,

Clerk. [23]

---

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 16,124.

A. O. LINDVIG,

Plaintiff,

vs.

C. HENRY SMITH,

Defendant.

**Engrossed Bill of Exceptions.**

BE IT REMEMBERED that the above-entitled action came on regularly for trial on the twenty-eighth day of May, 1919, before the above-entitled court, Honorable WILLIAM C. VAN FLEET presiding, and a jury duly empaneled and sworn, Nathan H. Frank, Esq., and Irving H. Frank, Esq., appearing as counsel for plaintiff, Messrs. Andros and Hengstler, and Messrs. Goodfellow, Eells, Moore & Orrick appearing as counsel for defendant, and that the following proceedings were had:

**Testimony of C. Henry Smith, in His Own Behalf.**

C. HENRY SMITH, defendant in said action, was called in his own behalf, was sworn, and testified as follows:

Direct Examination.

I reside at 2164 Hyde Street, San Francisco, and have been a resident of San Francisco ever since 1904, when I first came here.

In 1908 I went into the importing and exporting business on my own account and have been engaged in carrying on that business ever since. [24—1]

In 1913 I commenced to organize the company that afterwards was known as the Baja-California Company.

I organized the company. After I and friends of mine in San Francisco had subscribed seventy-five thousand ($75,000.00) dollars towards the stock of this company, I sent Captain M. O. Rustad to Norway, for the purpose of interesting Norwegian capital. The company was to be incorporated as a Norwegian corporation. While in Norway, Captain Rustad met Mr. A. O. Lindvig, a large ship owner. Captain Rustad then cabled me asking if he should connect with Mr. Lindvig and investigate his standing, and I cabled Captain Rustad to do so. I sent Captain Rustad to Norway in the early part of 1914, and I went over there myself in the early summer of 1914.

On June 29, 1914, and while in Norway, I entered into the following agreement with Mr. A. O. Lindvig:

(Testimony of C. Henry Smith.)

"Mr. A. O. Lindvig, of Christiania, and Mr. Henry Smith of San Francisco, have this day made the following agreement with regard to A/S Baja California, a steamship line to operate steamers between Mexican and Central—American ports—and West Coast of United States as well as British Columbia.

"For the steamship line as aforementioned Mr. Smith is to act as general-agent with authority to appoint sub-agents, when required for securing cargo northbound and southbound, fix charters, when sufficient inducements offer as well as make all necessary arrangements for docking and clearing of the steamer at the respective ports of call.

"It being also understood that the general-agent or sub-agents are to make contracts at the lowest competitive rates, for tallying and stevedoring. On all freight earned a commission of 5 (five) per cent is to be allowed Mr. Smith including any allowance or allowances made to sub-agents; besides this remuneration an allowance per steamer is to be made to cover incidentals, stamps and other disbursements for traveling expenses, as required, subject to special agreement.

"In the event any steamer or steamers of the A/S Baja California are fixed by Mr. Smith for other [25—2] voyages than as hereinbefore mentioned, or on time-charter a commission of 2½ per cent on the freight earned is allowed.

"This agreement is to remain in force for a

(Testimony of C. Henry Smith.)

period of 3-three years provided the line referred to above is maintained so long.

"Kristiania, 29th June, 1914."

On July 23, 1914, while at Christiania, I entered into the following agreement with Mr. A. O. Lindvig:

"It is hereby agreed between Mr. A. O. Lindvig, Christiania, and C. Henry Smith, San Francisco, with regard to the handling of the steamers of the Baja California line operating out of Pacific Coast ports, that C. Henry Smith be authorized to charge the actual outlays for stamps, telegrams and other incidental as well as initial expenses incidental to making all necessary arrangements in Central America for the handling of the steamers there. These outlays and expenses are calculated to amount to about doll. 45 per steamer per month.

"Furthermore Mr. Smith may apply for a postal subsidy from Mexican Government and the expenses in this connection expected to be about doll. 100 gold to be covered by the Baja California line.

"Christiania, July 23d, 1914."

Two vessels were built for the Baja California at Sunderland, England. These two were "Baja California" and "Sinaloa."

On November 30, 1915, I cabled Mr. Lindvig:

"Have option six thousand (6000) tonner United Engineering Works here model and arrangement like steamer Sverre and oil burner delivery within twelve months four hundred and fifty thousand

(Testimony of C. Henry Smith.)

dollars 'tween deck and electric light fifteen thousand extra. I can guarantee one hundred thousand dollars subscription of stock this city, if wanted, and further subscription South America Builders have option steel only few days so please telegraph quickly if interested. In case two boats contracted sixteen months second delivery but price then nine hundred and thousand dollars including tween decks and all."

On December 3, 1915, I cabled Mr. A. O. Lindvig:

"Six thousand tonner deliverable 10/12 months arranged for coal and oil otherwise good specifications price lowest and strictly net recommending contract [26—3] offer one hundred thousand dollars stock some of Dupont of officials also inclined."

Mr. FRANK.—Now, if your Honor please, I renew my objection upon the face of that telegram, because the telegram provides that the amount is strictly net.

On December 6, 1915, I cabled Mr. A. O. Lindvig:

"Six thousand tonner lowest price account steel now advanced and mills busy two years guaranteed speed nine knots. Will subscribe hundred thousand dollars stock. Some of Dupont officials will also take shares. American built steamers considered higher value otherwise refer cable third."

On December 7, 1915, Mr. A. O. Lindvig cabled me:

(Testimony of C. Henry Smith.)

"Accept 6000 tonner built. Highest class Lloyds case need four hundred fifty thousand dollars provided good speed specifications delivery latest October 1916 and Clean terms contract telegraph."

On December 7, 1915, I cabled Mr. Lindvig:

"Contract six thousand tonner reading ten twelve months builders say however October delivery very likely. Clean terms otherwise built highest class Lloyds Veritas and Norwegian Board of Trade subject American requirements. Telegraph."

By "Clean Terms" is meant that the contract must be clear, so that the builders, on account of hard terms in it, if the price of materials went up, could not get out of it, if they liked. It has nothing to do with any commission.

On December 9, 1915, I cabled Mr. A. O. Lindvig:

"Please telegraph whether acceptance six thousand tonner O. K."

And on December 10, 1915, Mr. Lindvig cabled me:

"Six thousand tonner accepted according exchanged telegram."

On December 10, 1915, Mr. A. O. Lindvig wrote me as follows:

"Messrs. C. Henry Smith Inc.,

"San Francisco.

"Dear Sirs: [27—4]

"I beg to confirm my letter of 1st inst. and

(Testimony of C. Henry Smith.)

further telegrams exchanged as per copies enclosed,—

"3/M Schooner 'Archer.' I note you have purchased this vessel and have retained $9,000 off the remittance per 'Sinaloa' and 'Baja' in settlement of my interest. I shall thank you to send me further details concerning the purchase and trade she was intended for.

"6000 Tonner. I note the builders have accepted my offer of $450,000.00 for one 6000 tons steamer, built highest class Lloyds, good specifications, fitted for both oil and coal burning, delivery to take place within October next year, and now await to receive contract with full particulars.—I note, you are willing to take interest for $100,000,—and that others are also inclined to take some stock, but as I have not yet made up my mind if the steamer is going to enter the 'BAJA CALIFORNIA' Company, I shall write you later on this subject.—I am sorry my telegram of 7th did not reach in ample time to secure the second steamer."

We bought her for the Mexican trade. I held her for two or three weeks and sold her and sent Mr. Lindvig half the profits, one-half of $12,000. We had bought her for $18,000, and the $9,000 mentioned in the above letter was retained by me off the remittance was for Mr. Lindvig's half of the purchase price.

On December 14, 1915, I wrote Mr. A. O. Lindvig:

"We beg to hand you herewith copy of telegrams exchanged in connection with the 6000 ton steamer we now contracted with the United Engineering Works of this City. The price $450,-000.00 was the lowest one obtainable and you may rest assured we endeavored to get it reduced, but on account of the steel being advanced and the contractors only had a few days left on the option of the material, it was impossible to get a lower price, $15,000.00 is to be added to the price just mentioned for wooden tween-deck and one 7 K. W. electric set, wired throughout and installed. The steamer will be practically a duplicate of the 'Sverre' with the following exceptions:—

"Forecastle to be subdivided for light wooden bulkheads, so that the crew may be provided with separate rooms to accommodate 2 in each on the port side and the firemen similarly situated on the starboard side. Double bottom to be arranged for carrying fuel oil, which would necessitate extra work to be done, or same as tank work. Stern frame to be of cast steel. [28—5]

"It was proposed to build two ships, a duplicate of the above named steamer, including wooden 'tween-decks and 7 K. W. electric sets for the sum of $905,000.00, delivery of one ship in ten to twelve months from date of acceptance and signing of the formal contract and specifications. Delivery of the second ship to be in 16 months from same date, but the price and delivery of second ship was conditionally however, to be United Engineering

Works being about to obtain steel necessary under the option they were holding.

"We regret exceedingly that your proposition to accept the 2 steamers with delivery of the 2 steamers in 14 months, came a few hours too late for acceptance here. The Company advised us a couple of days ago that they were offered a considerably higher price for a steamer of this type with delivery in 12 months and asked us if we would accept 16 months delivery with the reduction of $40,000.00, so it will be seen that we could do nothing in regard to this other boat. We advised of course, that we would not accept any delay.

"Terms of payment to be one twelfth (1/12) part of the total sum paid on signing of the contract and the remaining 11/12 to be paid in equal time payments; the final 1/12 to be paid on delivery of ship after a successful trial trip having passed Lloyd's inspection and the United States Steamboat Laws:—

"Payment to be specified, condition that the contractor has expended an amount for material and labor in proportion to the amount of payment.

"Should the contractor fail to complete the ship in the time called for in the contract, a penalty has been fixed at $250.00 per day for each working day delayed. On the contrary, he is to receive a bonus of $250.00 per day for each day delivery is made before the specified time.

"The Company advised that the prints and specifications have been sent to Lloyd's New York

(Testimony of C. Henry Smith.)

City, for approval and we expect these to be returned sometime next week when we shall have them forwarded at once.

"The steel has been ordered and will be shipped in the course of the monty; the drawings of the machinery now being made.

"Under separate cover we are sending you copies of the midship section, or the proposed midship section for Lloyd's approval.

"We are prepared to arrange for subscription of stock in this steamer to the extent of $100,000.00, as advised in the cables and we should therefore, like to know at an early date the name of the Company [29—6] and how these subscriptions should be made."

On December 3, 1915, Mr. Lindvig cabled me:

"Have just contracted two steamers three thousand three hundred tons each four hundred fifty thousand dollars including electric light and delivery within eight months consider same price one six thousand tonner too much but inclined pay four hundred thousand provided good specifications and delivery ten months."

On December 23, 1915, in my own name as the principal, I entered into a contract with the United Engineering Works for the construction of the 6000 ton vessel afterwards called the "Regulus." I did this because my principal was a foreigner, and the United Engineering Company wanted my name on the contract. [30—7]

"THIS AGREEMENT, made and entered into this twenty-third (23) day of December, Nineteen Hundred Fifteen (1915), at the City and county of San Francisco, State of California, by and between C. HENRY SMITH, INC. a corporation, organized and existing under and by virtue of the laws of the State of California, having its principal place of business in the City and County of San Francisco, in said State, (hereinafter called Smith), and the UNITED ENGINEERING WORKS, a corporation organized and existing under and by virtue of the laws of the State of California, having its principal place of business in the City and County of San Francisco, in said State, (hereinafter called United).

WITNESSETH.

That the parties of this agreement, for and in consideration of the mutual covenants and promises on the part of each to the other herein contained, have agreed, and hereby do agree, as follows:

ONE. The said United Agrees to construct or cause to be constructed, for the said Smith, a Steam Vessel, in strict accordance with the signed plans and specifications, which are hereto attached, and made a part hereof.

TWO. The said Smith hereby agrees to pay to said United for said vessel, at the times and in the manner hereinafter specified, the sum of FOUR HUNDRED and FIFTY THOUSAND (450,000) Dollars.

THREE. It is expected that said vessel will be ready for delivery in from ten to twelve months after the date of the signing of this contract and specifications, but [31—8] in consideration of the agreement herein contained on the part of the said Smith to pay a like sum to said United for each and every day before the expiration of said twelve months that the said United is prepared to make delivery in accordance with the terms of this contract, the United agrees that, if it fail to complete the said vessel within twelve months from said date (unless delayed by reason of excepted causes hereinafter mentioned, or of the non-payment by the said Smith in the manner and at the times herein provided of moneys due under the terms of this contract) it will pay to the said Smith the sum of Two Hundred and Fifty (250) Dollars for each working day beyond said twelve months that the said delivery is so delayed, and the said Smith hereby agrees to pay to said United the sum of Two Hundred and Fifty (250) Dollars for each and every working day before the expiration of said twelve months that the said United may tender or offer the said vessel to said Smith in accordance with the terms of this contract.

FOUR. The said Smith shall pay to the said United the said sum of Four Hundred Fifty Thousand (450,000) Dollars at the time and in the manner following:

Thirty-seven Thousand Five Hundred (37,500) Dollars on the signing of this contract; and the

balance in equal payments of Thirty-seven Thousand Five Hundred (37,500) Dollars at such times as said United shall exhibit to said Smith its daily record of time and material applied to the construction of the said vessel, showing an amount so applied of Twenty-eight Thousand One Hundred and Twenty-five (28,125) Dollars (excluding therefrom all overhead expenses, superintendence costs, and all profit), with the exception [32—9] that the final payment of Thirty-seven Thousand Five Hundred (37,500) Dollars shall be made after a successful trial trip and the tender of delivery of said vessel in accordance with the terms of this contract.

All of said payments, on account of the Four Hundred and Fifty Thousand (450,000) Dollars, shall, when made, be absolute, unless the United shall, at its election sell the said vessel upon the default of said Smith, in which event, the conditions as set forth in the last paragraph of clause Four of this contract shall be in force. The full and complete payment of the said purchase price shall be a condition precedent to any right on the part of the said Smith to said Vessel, or any part thereof.

Should the said Smith at any time fail to make payment in the manner and at the times hereinabove provided, then the said United may stop work on said vessel until such payment is made, and any delay so caused shall serve to extend for a corresponding length of time the twelve months

provided for the completion of said work, with the obligations, *neverless,* on the part of the said Smith to pay said Two Hundred Fifty (250) Dollars per day additional for each day the said work is delayed on said account.

Should, however, the said Smith continue in default for any such payments for the period of thirty (30) days, then said United shall be at liberty to decline to further proceed with the building of said ship for said Smith's account, and all interest of every nature, whether legal or equitable, of said Smith in said vessel, or the sums paid thereon, shall cease and be at an end, subject, however to the conditions of the last paragraph of clause Four herein. [33—10]

If, however, the said United should dispose of the said vessel by sale, after default on the part of said Smith, it is agreed that in the event the sum realized on said sale exceeds the contract price of the said vessel as provided herein, then the United will return to the said Smith a sum equal to the amount paid by him to the United to the date of the last payment by the said Smith, less Two Hundred Fifty (250) Dollars per day for said delay, as above provided. In the event that after the sale of the said vessel by the United, the proceeds of the said sale, plus the sum already paid to the said United by said Smith, total less than the contract price, then the said Smith shall pay to the said United a sum equal to the difference between the said contract price and the total of

the sum of said proceeds of the sale and payments made by said Smith to the date of his default.

FIVE. If while the said vessel is in the course of construction the same shall be damaged by reason of any of the exceptions hereinafter contained, the said Smith shall pay for all extra work, labor and materials necessary to repair such damage and to restore the vessel to the same condition in which it was at the time of such accident or other cause of damage, at the then market rate for such material and labor, plus ten (10) per cent; but if said damage be so great as to render it in the opinion of the United unprofitable for said United to reconstruct said vessel, then the United may abandon the further construction of said vessel. In the event of damage as in this article provided, whether the further construction of said vessel be abandoned or repaired as herein provided, the said United shall retain the moneys paid on account and shall turn over to said Smith, out of the net proceeds of any insurance that said United may recover against such loss, such proportion as may be fixed by the respective [34—11] interests of such parties.

The insurance effected upon said vessel by the United, shall be for full contract price and all premiums are to be paid by said United.

SIX. The title to said vessel, and to each and every part thereof shall be and remain in the said United until complete and final payment of the purchase price as herein provided, save that, in

the event of said United shall cease work on said vessel for a period of Thirty (30) days for any reason not enumerated in paragraph "Eight" and not due to the default of the said Smith, then all of the title to the said vessel, so far as constructed, shall be transferred to the said Smith, and the said United shall rent to the said Smith, for a reasonable rental, all of its tools, yards, appliances and equipments necessary to build the said Vessel, and the said Smith may complete or procure the completion of the said vessel in such manner as he chooses.

SEVEN. The said United agrees to deliver the said vessel to the said Smith free and clear of all liens, and further agrees before the delivery of the said vessel under this contract to have the same inspected by Lloyd's Agent and by the United States Steamboat Inspectors, and to have issued to said steamer the proper Certificate of Inspection giving said vessel under Lloyd's a classification of 100 A–1, and also a proper certificate under the United States Steamboat Inspection Laws.

EIGHT. Acts of God, fire, earthquake, strikes, lockouts or labor troubles of any nature, or any accident whether of the same kind as those hereinafter enumerated or not, and not arising from negligence of said United, always throughout this agreement excepted. [35—12]

NINE. Any dispute arising between the parties hereto with respect to the question as to whether or no the said work is being performed in accordance

with the specifications, shall be referred to a board of three (3) arbitrators at the port of San Francisco, for final decision, one to be appointed by the United and the other to be appointed by the said Smith and the third to be chosen by the two so appointed.

IN WITNESS WHEREOF, said C. Henry Smith Inc. and the said United Engineering Works, have hereunto caused their names and corporate seals to be hereto attached the day and year first hereinabove written.

UNITED ENGINEERING WORKS,
By SAM J. EVA, President.
By R. W. CURTIS, Secretary.
C. HENRY SMITH, INC.,
By C. HENRY SMITH, Pres.
By ————————. [36—13]

On January 13, 1916, I cabled Mr. A. O. Lindvig:

"SIX THOUSAND TONNER SENDING SPECIFICATIONS PLANS ALL APPROVE BY LLOYDS OBTAIN LIST SPARE PARTS STEAMER SVERRE WHEN BUILT AND MAIL AT ONCE. WILL YOU SEND INSPECTOR OR SHALL WE APPOINT ONE HERE."

On January 14, 1916, I wrote to Mr. A. O. Lindvig:

"In our telegram of yesterday we asked you to obtain a list of spare parts which were supplied the steamer 'Sverre' at the time she was built.

"The occasion for this request is that the United

Engineering Works have submitted to us an offer of $4,400.00 for a list of spares, as per enclosed copy.

"As we have insisted that there is hardly a freight steamer being built in Great Britian that has not the customary spares includes in the contract price, they have agreed to the steamer 'Sverre,' as this boat was given as the model in the specifications to a large extent.

"In regard to the inspector for the boat during the time when built, we would say that it would be essentially necessary to have one here and we shall appoint an inspector in San Francisco, or please advise us if you decide to send one out. We may say that all steamers which are now being built in San Francisco in various yards, have two or three inspectors on each boat*h*, although all of those steamers are being built according to the highest class of Lloyds rules.

"Yours very truly,
"C. HENRY SMITH, INC.
"By C. HENRY SMITH.

"P. S.—In the contract with the United Engineering there was provided a 7 K. W. electric plant, which was at the time thought large enough for light and wireless. However, the engineer with whom we went through the specifications in his opinion thought this plant was not sufficient, and we have therefore taken the liberty to arrange for a 10 K. W. set to be installed in place of the plant as aforementioned, with additional outlets and lights, at an additional price of $350.00, of which we hope you will approve."

(Testimony of C. Henry Smith.)

On February 11th, 1916 I wrote to Mr. A. O. Lindvig:

"February 11, 1916.

"A. O. Lindvig, Esq.,

"Kirstiania, Norway.

"Dear Sir: [37—14]

"We telegraphed you on the 5th, asking you to remit by telegraph $30,000.00 account of the steamer now building at the United Engineering Works, which we have received, and we shall render you account in due course.

'SINALOA.'

"The 'Sinaloa' arrived in Victoria on the 4th, in the afternoon, so far as we have been able to ascertain. We thought probably that the steamer had been delayed on account of snow storms which have been very prevalent in the north lately, as we had no wire as to the arrival. The reason for this was that all wires were down and we were unable to communicate with the agents up there, hence our cable to that effect. We sent you, however, a cable on the 8th, stating that the steamer arrived O. K."

On February 19th, 1916, Mr, Lindvig wrote me:

"Kirstiania, 19th February, 1916.

"Messrs. C. Henry Smith, Inc.

"San Francisco.

"Dear Sirs:

NEW BUILDING 6000 TONNER.

"I beg to refer to your cable of 8/12 1915—contract six thousand tonner reading ten twelve months

builders say however October delivery very likely clean terms otherwise built highest class Lloyds Veritas and Norwegian Board of Trade also subject American requirements—to which I replied—6000 tonner accepted according exchanged telegrams. In the specifications, however, I am surprised to find that neither the Norwegian Veritas nor our Board is mentioned. You will understand, I must have the boat fitted out according to the Norwegian Board of Trade requirements. I don't find the specifications satisfactory, and the contract is only made out for the benefit of the builders, so I am absolutely in their hands, if any trouble or accident should happen. I therefore cabled you on the 17th inst.—'general arrangement plan 6000 tonner not received. Contract not satisfactory. Section 3 contract fixed time for delivery must be stipulated. Section five very unsatisfactory, try exclude. Section six very unfavorable must be altered builders must deliver surety bonds for amounts paid as usual specifications hull and machinery not satisfactory posting additional details.' Enclosed you will find my remarks about the contract as well as the specifications. I trust you will put these before the builders and get a satisfactory arrangement. I never had a contract yet, where no surety were placed by the builders against payments made by the owners. I trust you will look into this matter, and awaiting your good news, I am,

"Your truly,

"A. LINDVIG.

(Testimony of C. Henry Smith.)

"If no date of delivery stipulated owners will have to pay $250 per day for time saved within the [38—15] twelve months and this can according to paragraph 3 amount to a considerable amount. If the vessel is finished in 10 months $15,000. If these terms cannot be altered to our satisfaction, I consider it best to sell the contract. Please telegraph result."

On February 23d, 1916, I wrote to Mr. A. O. Lindvig:

"A. O. Lindvig, Esq.,

"Kristiania, Norway.

"Dear Sir:

"We beg to enclose herewith receipt covering third payment on the steamer building at the United Engineering Works.

"Referring to your cable dated the 18th, reading as follows:

"'GENERAL ARRANGEMENT PLAN 6000 TONNER NOT RECEIVED STOP CONTRACT NOT SATISFACTORY STOP SECTION THREE CONTRACT FIXED TIME FOR DELIVERY MUST BE STIPULATED STOP SECTION FIVE VERY UNSATISFACTORY TRY EXCLUDE STOP SECTION SIX VERY UNFAVORABLE MUST BE ALTERED STOP BUILDERS MUST DELIVER SURETY BONDS FOR AMOUNTS PAID AS USUAL STOP SPECIFICATIONS HULL AND MACHINERY NOT SATISFACTORY POSTING ADDITIONAL DETAILS' which we have noted in every

detail. In this connection beg to advise that the United Engineering Works have sold out their plant to the Union Iron Works. The Union Iron Works is owned by the steel trust.

"Surety bonds for amounts paid on ships built in this country are not customary, and we considered the United Engineering Works able to complete and carry out the contract, and now that the Union Iron Works is behind the operating of this plant we would consider a request of this character superfluous. However, we are taking the matter up with Mr. Christy, formerly Manager of the United Engineering Works, and now in the employ of the Union Iron Works, and I am to meet Mr. MacGregor, the President of the Company to-morrow, and Mr. Christy assures me that he does not think there will be any objection to changing the contract as you suggest.

"At the time we were cabling you on this contract during the last days in November, you will recall that we were quoted this price, owing to the fact that the Company had an option on Steel, expiring a few days later, or, we believe, the date was December 1. The price on steel advanced considerable after that date, and we can inform you that a contract has not been signed for a similar steamer with 17 months delivery at the price of $650,000.00. We have been offered this steamer repeatedly by the Union Works, but thought the price was perhaps a little higher than the Company would like to go.

"The United Engineering Works at the time we made the contract, or some days later, were negotiating [39—16] with the Union Iron Works with a

view to sell their plant, of this we did not know at the time, and we believe these people or the owners of the United Engineering Works tried to get out of the contract or get it cancelled in some way. We had to see our Lawyers several time as the form of contract they put before us was impractical and we finally signed the form we sent you in order to avoid delay.

"The point in this contract was of course if payments were not made, or delayed, it would delay for the same time the construction of the vessel, and as we did not think there would be any trouble regarding the payments we signed the contract.

"However, the Union Iron Works have promised to meet us in every way and as it is a very large concern we can rely on it that the vessel will be completed on time.

"We have been promised delivery of the boat in 12 months as per contract.

"Your very truly,
"C. HENRY SMITH, INC.
By————————."

On March 28th, 1916, I wrote Mr. A. O. Lindvig:

"March 28, 1916.

"A. O. Lindvig, Esq.,
"Kristiania, Norway.

"Dear Sir:

"NEW BUILDING 6000 TONNER

"We are in receipt of your letters of February 19th, 22nd, and 28th, and also March 1st, and we have

in reply thereto sent you telegrams as per copies enclosed in to-day's mail.

"We are in receipt of a cablegram from you dated March 25th stating that you were posting specifications and list of spare parts of the 'Sverre.' We shall in reply say that we have of course contracted for a steamer here along the lines of the 'Sverre' and can only say that we will see that we get such a steamer, and we believe this will be satisfactory to the owners.

"As to surety bonds we enquired at the time in this City, when you brought the matter up, if such bonds were customary on this coast and we were informed that they were not with responsible builders. At any rate at the time we were contracting for the steamer you did not mention anything about surety bonds. Had you done so we should of course got the builders to pay for such bond, the cost of which is $1,125. [40—17]

"The Union Iron Works Company is now building 23 large steamers, some of them for Norwegian account as stated, we believe for Jebsen of Bergen. The contract for the two steamers were placed by Henry Lund Company of this City for the aforementioned firm. There are no surety bonds for any of the steamers building at the Union Iron Works Company, and we therefore believe it is only wasting money for us to do so. At all events there is no cause for excitement.

"As regards your specifications:

"No. 1. The builders undertake to deliver a vessel like the 'Sverre.' We beg to enclose copy of the original agreement which explains itself.

*Deck Erections: 'Tween-deck in holds.* The revised plans which we sent you a few days ago show the 'tween-deck laid as agreed of 4" Oregon Pine bolted to the hold beams. We have accepted these plans subject to specifications and contract.

*Doors:* Tonnage openings will be provided in the poop and in the after bulkhead of the bridge.

"3. *Load Line:* Will be given according to Norwegian Rules. The free board mark will be according to British Rules as specified.

*Certificates:* For Suez and Panama will be supplied by the owners.

*Bitts, Fairleads & Deck Fittings:* Are larger than usual.

*Bulkhead:* Will be submitted to Lloyd's local surveyor for consideration. If acceptable to them the Bulkhead will be left out and web frame substituted. We have telegraphed you in this respect so that we can make necessary arrangements.

"4. *Bunkers:* There is a bunker on the port side.

"6. *Cargo Battens:* Are provided for.

*Ceiling:* Tank tops will be ceiled right over therefore there will be no margin angle.

"7. *Cementing:* Noted.

"8. *Double Bottom:* Will be same as 'Sverre,' and will be arranged for carrying oil. The tank

tops will be doubled riveted. All [41—18] other riveting about the tanks will be as customary for carrying oil. Lloyds will permit oil in double bottoms. Filling and suction arrangements will be made through suitable manifolds, as customary here. Method of access will be suitable to Llyods as all pipe connections will be.

The double bottom vent pipes will be as large as the filling pipes, which are usually 3½" into each section of the double bottom.

"9. *Fresh Water Tank:* Will be cement washed.

"10. *Hatches:* 12' 6" x 17' 0". Hatch will be in ship.

"11. *Position of accommodation Ladder:* Does this mean ladder or ladders from main deck to the bridge deck. In the completed plans all such things will be indicated.

"14. Size of Bunks noted.

"15. *Tunnel:* Propellor shaft will draw into hold without removing tunnel top plates.

"16. Ventilators to holds will be 18". There is a ventilator at the further end of each tunnel. Bunkers will be ventilated.

*Winches:* Steam pipes and valves will stand more than 130 pounds. Exhaust is lead to main condenser. Each Winch will have a separate valve.

*Windlass:* Will exhaust on each side of the vessel.

"18. *Boats:* Captain Rustad will supervise the equipment. Iron deck fittings will be galvanized. Sanitary salt water tanks, etc., will be provided, to be pumped up from engine room.

Hospital is not provided for in the specification but will receive attention.

Other items under this number will be as requested.

ENGINE SPECIFICATIONS.

Page

"3. Contractor will alter for additional compensation. [42—19]

Page.

"5. Provided.

"6. Provided.

"7. Provided.

"7. Provided.

"8. Provided.

Armoured hose not provided here.

Metallic packing provided.

"9. Provided for.

Lubrication Suitable lubricator will be provided.

"10. Pipe arrangement not yet made. Observations noted in connection therewith.

"11. Boiler covering will be on the backs of the boilers.

Concerning evaporator, spare propeller, propeller shaft, etc., or must be guided by the "Sverre" equipment.

The electric plant will be complete, covering all points mentioned.

"15. Items referred to in specifications will be shown in the plans as things progress, as usual.

Note.—Contractors undertake to deliver a vessel like the 'Sverre.'

"As to time of delivery we can only refer to the cables exchanged at the time of contracting, when we stated ten to twelve months delivery. The builders undertook to, deliver the vessel in twelve months and pay a penalty of $250.00 per day for every day thereafter, in case that steamer is not delivered. In case of delivery before expiration of this time, we to pay them $250.00 per day. Should the steamer be delivered in November, which we have been informed, however, will not be the case, as the builders have informed us that they will deliver on time, as per contract, but, should they deliver before this time, we do not see how any loss can occur, as the steamer should be well able to earn considerably more than $250.00 per day.

"We shall send you details and plan of the [43—20] fittings, etc., as soon as we receive them from the builders, and also other details as required.

"Yours very truly,

"C. HENRY SMITH, INC.,

"By ————————.

"CHS/B.

"Enc.

"P. S.—According to enclosed confirmation the builders are to deliver steamer also to Norwegian Board of Trade requirements."

On February 22, 1916, Mr. Lindvig wrote me:

"Your favours of 14th, 19th, and 20th 1. m. to hand and contents carefully noted. In regard for

(Testimony of C. Henry Smith.)

inspector for the boat during the time when built, I should think, that our Captain Rustad (as mentioned before) together with Lloyds representative would be enough and quite satisfactory to the owners. I have never heard of two or three inspectors on one boat. I note in the contract with the United Engineering a 7 K. W. electric plant was provided. I quite agree with your engineer that 10 K. W. plant should be installed for the additional price of $350. I note the price asked for additional spare gear amounting to $4400. I have never had a contract yet, where not spare propeller etc. as mentioned in your favor of the 10th 1 m. were supplied by the builders, without extra charges, and trust you will look into this matter. Our agreement is spare ports as s/s 'SVERRE,' and this I think ought to be sufficient, as most of the above spare ports are mentioned in this steamers contract. I note you say the new hull scantlings will weigh some fifty tons more than the 'Sverre.' I do not quite understand the meaning of this. Sure this will have nothing to do with the deadweight capacity of the steamer as she is contracted to carry 6000 tons in which hull scantlings and wood 'tween decks should be excluded.

"I trust that the United Engineering will work out the lines of the steamer, so that she gives satisfactory speed, dead-weight and suitable freeboard."

On December 21, 1915, Mr. Lindvig wrote me:

"6000 tons vessel. I have decided not to let this vessel go into the 'BAJA CALIFORNIA' company,

(Testimony of C. Henry Smith.)

but to form a new company, which I have thought of naming the joint stock company 'PACIFIC.' I enclose copy of subscription [44—21] circular, from which you will note, that the joint-capital is placed at Kr. 850,000—as a mortgage loan will be raised for the rest of the purchase price. The value of the shares will be Kr. 5000. each. Up to the present has been subscribed Kr. 635,000, and I have therefore for the present reserved for you an amount of up to Kr. 200,000, and will be obliged for your telegraphic reply upon receipt hereof, if you are considered included herewith. The money, as you will see, is to be paid with 10% on the 15th of each month figured from and including January 15th, 1916. For the present I have asked you to pay the first installment and in order to avoid the heavy expense connected with telegraphing the money, I will be thankful to you. If you will until further pay installments due, and I will after new year send you by letter a large remittance on account. Likewise you can then in future retain remittances per 'BAJA C.' and 'SINALOA' and by telegraph advise me, that same have been collected, whereupon transfer will take place here at current rate of exchange." [45—22]

Q. Now, Mr. Smith, he speaks here of the fact that the capital is placed at 850,000 crowns and he has reserved for you an amount up to 200,000 crowns. How much is 200,000 crowns in our money?

(Testimony of C. Henry Smith.)

A. About $54,000.00—at that time it would be $54,000.

Q. You have stated in your telegram to him, that you would subscribe $100,000. A. Yes.

Q. But he did not reserve but about $54,000.00 to you? A. Yes.

Q. Now, on January 11, 1916, did you send Mr. Lindvig a cablegram of which this is a copy?

Mr. FRANK.—The same objection, immaterial; it has nothing to do with this transaction.

The COURT.—The objection is sustained Mr. Moore; it is wholly immaterial now.

The Court thereupon sustained said objection, to which ruling counsel for the defendant duly excepted, and said exception is here specified and designated:

EXCEPTION No. ONE.

The cablegram of January 11, 1916, from the defendant to the plaintiff, and which was referred to in the question, to which the objection was sustained read:

"Statsraad Lindvig,

"Kristiania (Norway).

"STOCK ACCEPTED LETTER TWENTY FIRST DECEMBER SINALOA SAILED TWENTYFOUR HUNDRED THIRTY TONS.

"SMITH." [46—23]

The defendant then offered the following cablegrams received by him from the plaintiff:

"January 19, 1916.

"If you don't wish to overtake full amount two

(Testimony of C. Henry Smith.)

hundred thousand Kroner Pacific, I can dispose of about one hundred thousand here please telegraph."

At the same time the defendant offered a cablegram by him to the plaintiff in reply to the foregoing from Mr. Lindvig. This last-mentioned cablegram read:

"January 19, 1916.

"Cannot give up any of two hundred thousand Kroner stocks writing."

Counsel for the plaintiff thereupon objected to the introduction of the above-mentioned telegram as being immaterial.

The Court sustained said objection, to which ruling the counsel for the defendant duly excepted, and said exception is here designated.

EXCEPTION No. TWO.

The "Regulus" was built on the Oakland Estuary, and I had to make a great many trips over there, and it took up a great deal of my time.

"Q. Were you to be the agent of this 6000 ton steamer when it was completed and turned over?

"A. Yes; that was understood."

The COURT.—Q. Mr. Smith, this vessel was subsequently completed, was it not? A. Yes.

Q. And turned over to the owners? A. Yes.

Q. And accepted by them. A. Yes. [47—24]

Q. I suppose in your statement with the owners you put in this charge that you have got in here for your services? A. Yes.

(Testimony of C. Henry Smith.)

Q. When did you do that?

A. That was done after the vessel was delivered and accepted by the owners.

Q. What date, if you remember?

A. In March or April, 1917.

Q. Was any objection made to your charge at that time? A. Not at that time.

A Western Union night letter, dated San Francisco, March 8, 1917:

**Defendant's Exhibit "JJ."**

"United States Shipping Board,

"Munsey Building, Washington, D. C.

"In December nineteen fifteen a contract was entered into between undersigned and United Engineering Works for the construction and sale of a steel steamer Regulus stop. Undersigned was acting solely as agent for A. O. Lindvig of Norway who furnished the money for the purchase, the contract having been made in his behalf and confirmed by him stop. The ship is practically completed and is advertised for sailing to South America on Thursday next all cargo having been booked and much of it having arrived in San Francisco ready for shipment stop. Norwegian *Counsel* stands ready to give Norwegian temporary registry stop. Since ship owned by Norwegian and neither enrolled, licensed or registered American am advised by consul that Shipping Act does not apply stop. However, in order that no possible misunderstanding later we hereby explain transaction stop.

(Testimony of C. Henry Smith.)

Simply desire to know that no objection by Board to completion of contract by final payment to builder by undersigned for Lindvig and delivery to Lindvig of formal bill of sale so that vessel can get away stop. Any delay beyond that time means loss of more than two thousand dollars daily stop. May we ask for reply at your earliest convenience.

"C. HENRY SMITH INC."

(The document was marked Defendant's Exhibit "JJ.")

The next exhibit is a telegram from the United States [48—25] Shipping Board to C. Henry Smith, Inc., dated March 10, 1917, and was received here on March 11 in San Francisco.

**Defendant's Exhibit "KK."**

"C. Henry Smith, Inc.,

"San Francisco, Calif.

"Have you owned any interest in ship Regulus or has any other American person owned any interest in said steamer since December Twenty Two Nineteen Sixteen period was this contract in your name originally, and assigned to A. O. Lindvig and if so when was it assigned, or was it made out originally in your name as agent for A. O. Lindvig.

"UNITED STATES SHIPPING BOARD."

(The document was marked Defendant's Exhibit "KK.")

On March 12, I telegraphed:

(Testimony of C. Henry Smith.)

**Defendant's Exhibit "LL."**

"March 12, 1917.

"William Denman,

"Chairman United States Shipping Board,

"Munsey Bldg., Washington, D. C.

"Regulus contract made in our name stop. No assignment has ever been made as we have always acted as agent for Lindvig in the matter, hence had nothing to assign stop. Out of $412,500 already paid shipyard Lindvig has paid directly by cable or from his money on hand with us all but $39,400 stop. We financed this $39,400 for him and he is to repay us in stock of a proposed Norwegian corporation which we understand is ultimately to take over the ship stop. We have never received any stock and look simply to Lindvig for repayment in case corporation does not take ship stop. This is only possible American interest we know of stop. All payments of Lindvig but one of $37,500. Made prior to December 1916 Stop Freight rapidly coming into port matter extremely urgent.

"C. HENRY SMITH, INC."

(The telegram was marked Defendant's Exhibit "LL.")

Q. The stock that these friends of yours subscribed for, and the three shares that you got had not been received by you at this time? A. No.

Q. Do you know whether the corporation had been formed at that time?

A. I don't know. [49—26]

Mr. MOORE.—Next is a message to C. Henry Smith, Inc., from the chairman of the United States Shipping Board:

**Defendant's Exhibit "MM."**

"1917 Mar. 12 Washington, D. C.

"C. Henry Smith, Inc.,

"San Francisco, Calif.

"It will be necessary for us to have contract made with yard before we can pass on your petition your status involves consideration of legal questions which documents alone can solve. We should also have copies of letters exchanged between yourselves and your Norwegian correspondents to determine character of relationship to them. Our suggestion is that you form a corporation under laws of one of United States in which you or your correspondents own all the stock and operate vessel under American flag. There is nothing now to prevent you making any voyage under our flag which you could make under the Norwegian. It is of course, possible that both these countries may be drawn into hostilities, but this is a matter of course for your own consideration.

"DENMAN, Chairman."

(The document was marked Defendant's Exhibit "MM.")

Next is a telegram from C. Henry Smith, Inc., to William Denman, Chairman, United States Shipping Board, dated March 14, 1917, which reads:

**Defendant's Exhibit "NN."**

"Contract with yard etc., mailed last Friday stop Mr. Thatcher of the firm Denman & Arnold here now on the way to Washington and will arrive Friday with additional documents to show our status stop If the Board should refuse permit for the transfer of the vessel to Norwegian flag, we shall suggest to the owner that a corporation be formed under one of the Laws of the United States and operate the vessel under the American flag, but we have no authority to do so without his consent.

"C. HENRY SMITH, INC."

(The document was marked Defendant's Exhibit "NN.")

The next is a cablegram from Mr. Smith to Mr. Lindvig reading as follows:

**Defendant's Exhibit "OO."**

"San Francisco, March 16, 1917.

"Statsraad Lindvig,

"Kristiania (Norway).

"United States Shipping Board is against transfer Regulus Norwegian flag stop They take attitude that [50—27] under paragraph six contract with Union title of vessel remains with builders until delivered stop Vessel will deliver next week delayed account strike stop Eleventh payment made stop Shipping Board indicate they will allow transfer vessel to American corporation all stock of which to be held by you and associates stop Rul-

ing as to whether Norwegian crew may be employed expected in a few days stop In case you do not wish to incorporate vessel I may stand as owner of same stop According to ruling vessel must first be offered for sale now to Shipping Board stop Cannot say at present what they will pay stop Would suggest vessel be operated American flag until such time as she may be transferred or to sell her in few months if so desired stop. At time contract made it was in our name for protection of same.

"SMITH."

(The document was marked Defendant's Exhibit "OO.")

Next is a copy of a letter sent by Mr. Smith:

**Defendant's Exhibit "PP."**

"March 29, 1917.

"United States Shipping Board,

"Munsey Building, Washington, D. C.

"By night letter sent today, we enter into formal agreement referred to in your wire of today. Stop. Kindly notify Collector of Port as soon as possible that transfer of Regulus to Lindvig and registry under Norwegian flag now proper, so that we can be*ing* loading immediately. Thanking you for your courtesy in this matter,

"C. HENRY SMITH INC."

(The document was marked Defendant's Exhibit "PP.")

Then enclosed in that letter is a night letter:

"March 29, 1917.

"United States Shipping Board,

"Munsey Building, Washington, D. C.

"In consideration of the United States Shipping Board having waived any and all right to purchase, under section Nine of the United States Shipping Act of September seven, nineteen sixteen, the steamer Regulus, now in the port of San Francisco, California, and having also granted and approved the sale and transfer of said steamer to A. O. Iindvig of Christian, Norway, said A. O. Lindvig does hereby agree with said United States Shipping Board that said steamer Regulus will make three consecutive round trip voyages from said San Francisco or from other American port or ports on the Pacific Coast of North America, to port or ports on the West coast of South America, and that the first of said round trip voyage [51—28] will be commenced within twenty-one days from date.

"A. O. LINDVIG.

"By C. HENRY SMITH, INC., Agent."

"We guarantee that the above agreement will be carried out by the Regulus.

"C. HENRY SMITH INC."

Next, the Shipping Board wires, under date of March 29, 1917:

**Defendant's Exhibit "QQ."**

"C. Henry Smith, Inc.,

"San Francisco, Cal.

"In consideration of owner of Regulus enter-

ing in agreement offered in your telegram of March twenty-eighth Shipping Board waives any right it may have to purchase Regulus under provisions sections nine shipping act prepare agreement and forward same to board. Board looks to your personal assurance of its performance as much as to terms of contract.

"SHIPPING BOARD."

(The document was marked Defendant's Exhibit "QQ.")

Then on the same day I sent two cablegrams to Mr. Lindvig. The first reads:

**Defendant's Exhibit "RR."**

"San Francisco, 3/29–17.

"Statsraad Lindvig,

"Kristiania (Norway)

"Except favorable decision transfer Regulus Norwegian Flag."

"SMITH."

(The cablegram was marked Defendant's Exhibit "RR.")

And the second cablegram sent evidently later in the day reads:

**Defendant's Exhibit "SS."**

"March 29, 1917.

"Statsraad Lindvig

"Kristiania (Norway)

"Permit transferring Regulus Norwegian Flag obtained stop Condition on making three more voyages to Chile stop Steamer will be fully com-

pleted Saturday stop Commence loading Monday stop Vessel satisfactory trial trip eleven knots speed attained.

"SMITH."

(The cablegram was marked Defendant's Exhibit "SS.") [52—29]

The following is a letter written by me to Mr. Lindvig on June 1, 1917, which also contains a statement of account between me and Lindvig, dated June 1st, 1917:

"June 1, 1917.

"A. O. Lindvig, Esq.,

"Kristiania, Norway.

"Dear Sir:

"Herewith please find General Account to cover miscellaneous expenses and the transferred balances of S. S. 'Sinaloa,' V-8, and S. S. 'Regulus,' V-I.

"As per your favor of February 28th, 1917, calling our attention to an overchange of $68.69, we have checked over our account and find that this was erroneously charged to you; we therefore are crediting you with this amount.

"We are also enclosing duplicate copy of bill from Haller-Cunningham Electric Co., which amounts to $700.00. This is the voucher that was short on Statement No. 12, of the S. S. 'Sinaloa' account.

"The balance of 30 per cent., account shares of 'Pacific,' is credited to you in this account at the exchange of 27/5/6.

"The dividends on the 'Baja California' stock has been debited to you in this account amounting to $15,698.00.

"The credit balance due you amounting to $24,138.36, was placed to your credit in the First National Bank.

"Trusting that you will find the above mentioned account in order, we beg to remain,

"Yours very truly,

"C. HENRY SMITH." [53—30]

**Defendant's Exhibit "VV."**

"San Francisco, U. S. A., June 1, 1917.

"A. O. Lindvig,

"Kristiania, Norway.

"In Account with C. HENRY SMITH INC.,

"Steamship Agents and Brokers,

"311 California Street.

| | Dr. | | | Cr. |
|---|---|---|---|---|
| 1917. | | 1917. | | |
| Mar. 15. Postal Telegraph Co. .....$ | 47.39 | | Balance .....$ | 7,433.24 |
| 27. Western Union Tele. a/c Tele. for March ... | 100.09 | Apr. 10. | Alberto Scott a/c Sale of Mnfst. ..... | 9.20 |
| 29. 60% Dividends on Kupon #6 Certificate #287 to 302, 305 to 316–318 to 323, 325 to 327–348 to 353, 897 to 935–941 to 952 Kupons @ 167. | 15,698.00 | | Wilcox Peck & Hughes a/c Refund ..... | 83.05 |
| | | | Balance "Sinaloa" V-8 a/c. | 41,699.41 |
| | | | Balance "Regulus" V-1 a/c. | 53,319.92 |
| Sundries Tele.— Jan. ..... | 105.20 | | Advance a/c Mrs. Petra Smith ..... | 200.00 |

(Testimony of C. Henry Smith.)

| | | Dr. | | Cr. |
|---|---|---|---|---|
| Apr. 3. | Com'l News Pub. | 20.00 | "ALTA" Ins. @ 8% ..... | 1,200.00 |
| 7. | O'Connell & Davis | 46.00 | 30 a/c 200,000 Krns. @ .27-5/6 ..... | 16,700.00 |
| 16. | Guide Pub. Co.. | 35.00 | "ALTA" Ins. . | 607.50 |
| 27. | Com'l News Pub. Co. ..... | 20.00 | To credit items charged twice see "BAJA-CALIFORNIA" State. #27 . | 68.69 |
| May 1. | First Nat. Bank Deposit ..... | 75,000.00 | | |
| 4. | Metropolitan Press ..... | 58.50 | | |
| Apr. 12. | Western Union Tele. Co. .... | 52.47 | | |
| | Remuneration a/c Building S. S. "REGULUS" | 6,000.00 | | |
| | Balance Due A. O. Lindvig. | 24,138.36 | | |
| | | 121,321.01 | | 121,321.01 |

(The account was marked Defendant's Exhibit "VV.") [54—31]

Q. (Mr. MOORE.) I draw your attention to the item there (referring to the account of June 1,1917), remuneration acount building S. S. "Regulus," $6,000.00. A. Yes, sir.

The COURT.—What is the date of that account, Mr. Moore?

Mr. MOORE.—June 1, 1917.

Q. The "Regulus" was actually completed the last of March, or rather, she sailed in the middle of April, did she? A. Yes, sir.

Q. How was it that this account contains items in April and May and that this item for remuneration, account of building of "Regulus" did not appear until you made up your June statement?

(Testimony of C. Henry Smith.)

A. Well, because we did not have the time. We did not have all of the vouchers in.

The "Regulus" made her first outward voyage in April, and all the vouchers were in and the account closed by June 1, 1917. In my statement of accounts with Mr. Lindvig, dated June 1, 1917, I included the following items: "Remuneration account building steamship 'Regulus,' $6,000.00."

Next a letter from Mr. Smith to Mr. Lindvig, dated April 24, 1917, reading:

**Defendant's Exhibit "TT."**

"A. O. Lindvig, Esq.,

"Kristiania, Norway.

"Dear Sir:

"6000 TONNER–SEPTEMBER DELIVERY:—"

Q. In the meantime you had contracted for another boat from the Union Iron Works, which was afterwards known as the "Romulus"? A. Yes.

[55—32]

Q. And that is what this 6000 delivery refers to?

A. Yes.

Mr. MOORE.—(Reading:)

"In reply to your favor of the 17th Feb, we have sent you the receipt for the $75,562.50 with our letter of the 5th inst.

"As to delivery of this vessel, we are in close touch with the Union Iron Works Co., who intimate that delay is unavoidable owing to the fact that the material is not coming forward as anticipated. The Government is asking all shipbuilders to put all

private work aside for the time being in so far as they can do so, but we believe that this vessel will give delivery some time in October or November. The keel is expected to be laid some time in June or July.

"We took the liberty to telegraph you about the stock in this vessel, as we asked you at the time the contract was made to reserve such shares in the amount of $50,000., and we shall be glad to learn how same is payable. We are now in receipt of a cable from you saying that the stock is not for sale as yet and asking us if we recommend that the ship be sold at the present time and to state eventual price. Inasmuch as it is our understanding that the vessel is being built for South American trade, it would of course be unnecessary to add any extra work on same if you prefer to sell. The 'BAJA CALIFORNIA' and the 'SINALOA' are rather small for Chilean trade and if it is your wish to keep the service you have inaugurated there, it will be necessary to have two steamers of the size of the 'REGULUS': but this of course is a matter for your own consideration.

"The 'REGULUS' we believe will prove a very handy ship for this Coast business. She is a very good carrier and being a very economical ship all around, we believe she should prove an exceedingly profitable investment for the stockholders.

"RATES: On flour, to Valpariso for instance we are now quoting $17.00. We telegraphed you the other day about a surcharge which was proposed by W. R. Grace & Co. to offset extra charges on account

(Testimony of C. Henry Smith.)

of the war. Grace & Co. proposed a surcharge of 50% on the present rates, which we telegraphed you. We, however, accertained that the surcharge was not imposed by Grace & Co. and we therefore hesitated to ask the shippers to pay same. Afterwards a representative of Grace & Co. rang us up and said that they would impose a surcharge of 25%, which they thought was a fair and reasonable increase. We are at the present time taking cargo subject to a surcharge being added to the rate given, and we shall write you how this matter comes out.

"That a surcharge should be added we believe firmly, on account of the higher rates for stevedoring and also on account of oil having increased in price, both here and down South. The oil contract with the Standard Oil Co. covers only three steamers at this *pot,* at 65¢ per barrel. At the present time oil is $1.25 per barrel. We thought it advisable to leave [56—33] the "Governor FORBES" outside this contract, as she burns of course only half of what the 'REGULUS' requires. The oil contract at San Pedro covers all the steamers."

(The letter was marked Defendant's Exhibit "TT.")

Q. That oil contract at San Pedro was with the General Petroleum Company, was it not? A. Yes.

Q. That also was for 65¢ a barrel? A. Yes.

Q. And extended until September, 1918?

A. Yes.

Under date of July 18, 1917, Mr. A. O. Lindvig wrote to me as follows, which letter was received

by me October 15, 1917, and to which I replied November 8, 1917. Under the circumstances existing at that time, it will take some three or four months for a communication to reach its destination:

**Plaintiff's Exhibit No. 10.**

"Since writing you on the 12th inst. I have received your favors of 1st (two) and 13th June (three), contents of which are noted. I beg to enclose a statement of cables exchanged.

"S. S. 'SINALOA.' I have no news since your cable of 10th.

"S. S. 'BAJA CALIFORNIA,' Referring to the statement of bookings you have sent, it appears that the freight of $46,000—11th southbound voyage, does not correspond to an increase in rates all round of 25%, in face the freight has not been increased even by 10%, compared with the previous voyage, I have talked over this with Captain Rustad, but he was unable to give any explanation. The rate on flour, for instance, is constantly figuring as $15. How am I to explain this?

"S. S. 'GOVERNOR FORBES' I am still without any news re this vessel, since her arrival at Corinto about 27th June.

"Re the matter of supplies, I fully note what you write I have so far no letter from Captain Christiphersen, but it may become necessary to have specified the cases where you could have saved the ship from $1000.—to $1500.—in order that I may [57—34] put this before Captain Christophersen to obtain his explanation. I expect that the ship-chandlers or

the dealers, to whom you have applied, are able to give signed statements, fixing approximately the prices at that time, for the brands and qualities usually bought. I should then submit the same to Captain Christophersen, in order to obtain his counter-statements.

"CONTRACT DUPONT. I await your further news in reply to my cable of 10th inst.

"NEW BUILDING. You have evidently not received my message of 12th inst, when dispatching your cable of 15th?

"I am glad to note that expected delivery in October November means that her position is much better than that of other similar contracts.

"Port Captain or Inspector. This matter is having my attention and I may come back to same later on.

"S. S. 'REGULUS'. The round trip will be taking very long time, and I must hope that the arrangements you are making for her next voyage, will bring a better result. As you are contemplating sending her to Valparaiso also next trip, I take it that you have difficulty in obtaining sufficient cargo for the other ports in Chile?

"Your statement of 1st June. As far as I can see hitherto, there is no voucher concerning the item 'Remuneration a/c Regulus $6000.' Please explain same."

(The document was marked Plaintiff's Exhibit No. 10.)

Under date of August 29, 1917, Mr. Lindvig wrote to me as follows:

"I have now gone through your accounts en-

closed in your letter of June 1st, and find same in order with the exception of following items in the general statement dated June 1st: Re balance from of S/S 'Sinaloa' voyage 8 is transferred with the amount of.....$41,699.41
While the statement says.....40,611.99

Which makes a difference in your favor of $1,087.42

"The items $1200.— & $607.50 for insurance per barkentine 'Alta' have already been credited me, in statement 25 S/S 'Baja California' and statement 1 S/S 'Governor Forbes' respectively. The amounts have therefore been credited you again, as the policies were not renewed. On the other hand I have debited you premium on interest insurance as per my letter of July 14th 1916, $84.90. This policy and the hull policy were, however, prolongated until the ship's arrival at nearest port of loading or discharging and as I learn from your telegram of 22nd inst., that she has arrived Melbourne, I debit you for the [58—35] premiums kr. 608.22 & kr. 41.82—$180.60.—

"I also debit you for remittance June 15th to Mrs. Petra Smith $300.—and telegrams 1916–1917 account 'Alta' $70. The balance of these items makes $2259.42 in your favor, which I hope you will find correct and settle in your next account.

"As formerly told you, there was no voucher rewarding remuneration a/c building SS. 'Regulus' $6000.

"Copy of your statement two for S/S. 'Governor Forbes' has not yet come to hand, but I now hope to receive it one of the first days.

I do not remember whether I sent a voucher for

the $6,000.00 as part of the remuneration building of the steamship "Regulus" with my statement of June 1st, but I sent a voucher afterwards.

On November 8, 1917, I wrote to Mr. Lindvig the following letter. I do not know whether he received it in December or January.

**Plaintiff's Exhibit No. 11.**

"November 8, 1917.

"Mr. A. O. Lindvig,

"Kristiania, Norway.

"Dear Sir:

"I have just received your letter of July 18th and contents noted.

"S.S. BAJA CALIFORNIA.

"Referring to statement of bookings which you call attention to, would say that these bookings were engaged before the increase of 25% took effect. In the regular trade it is always, of course, necessary to carry forward all contracts, whether there is an increase or not, in the rate of freight. This matter however has been fully explained to you as I believe you telegraphed regarding same.

"SS. GOVERNOR FORBES."

"Regarding the prices for the supplies for this vessel beg to advise that the men that you have now in your office here, can give you these figures, that you ask for, as they were attending to this matter while employed by me. [59—36]

"STATEMENT FIRST OF JUNE.

"Regarding this voucher, we have sent you one as far as I remember and it is for attending to con-

tract, making payments and keeping books for this vessel and also for protecting the contract.

"Yours very truly,

"CHS:MC. C. HENRY SMITH."

(The document was marked Plaintiff's Exhibit 11.)

Under date of May 31, 1917, the plaintiff wrote to the Norwegian Legation at Washington, D. C., as follows:

"Re transfer to Norwegian Flag. I hereby beg to state that in August last year I contracted for a 'New building of about 6000 tons d. w., through my agents at San Francisco, Messrs. C. Henry Smith Inc. The time for delivery according contract is September this year. Builders: Union Iron Works, San Francisco.

"Two Months ago I took over a similar steamer from the Union Iron Works, and she is now running under Norwegian flag in a regular trade, which I started a couple of years ago on the W. C., i. e. loading flour, wood & general merchandise at Frisco and Northern ports for Peru and Chile and returning with nitrate from Antofagasta (for account of the large firm of Dupont), in which trade 4 of my steamers are now engaged, viz.:

| | | | | |
|---|---|---|---|---|
| 'Regulus,' | About | 6000 | tons | d.w. |
| 'Baja California' | " | 2600 | " | " |
| 'Sinaloa,' | " | 2600 | " | " |
| 'Governor Forbes,' | " | 2500 | " | " |

Considering the fact that I intend to maintain the line, which I have started on the W. C. and for which more tonnage is always wanted, and to employ

the above mentioned new building in that trade, I consider it may be feasible to obtain in this case the sanction of the American Authorities in as far as the transfer to Norwegian flag is concerned.—

I believe that this Norwegian line of steamers, the capital of which is partly subscribed by American subjects is very well recognized on the W. C., and I should very much esteem the kind assistance of the Legation in this matter, in order to obtain a favorable result.—

"Any other information, which may be desired, can be had on applying to my agents at San Francisco, Messrs. C. Henry Smith, Ins." [60—37]

On July 14th, 1917, I wrote to Mr. Lindvig a letter, which is as follows:

"ACCOUNTS.

"We beg to hand you herewith disbursement accounts of the S.S. 'Baja California' V–11, S.S. 'Governor Forbes' V–2, and also general account. We are forwarding under separate cover, supporting vouchers, as we think under the conditions that this is the best way to handle those accounts in case of loss.

"S.S. 'Governor Forbes': Owing to the extra high cost of Stevedoring, Food Supplies, and also the repairs and Fuel Oil, the expenses on this ship were very high. We are endeavoring to adjust these charges for the next trip.

"S.S. 'Baja California': Owing to the unsettled labor condition and in order to give the ships good dispatch, we have decided to do our own stevedoring

(Testimony of C. Henry Smith.)

at Puget Sound, and about this matter we are writing you separately.

"General Account: You will note that we have paid the second payment on Hull No. 154, amounting to $75,562.50. We have therefore debited this account and will credit same on receipt of remittance from you.

"Trusting that these accounts will be found in order, we beg to remain,

"Yours very truly,

"C. HENRY SMITH."

On July 16, 1917, I cabled the defendant:

"Have you decided regarding fifty thousand dollar stock I asked you to reserve September last year second new building stop Please let me have the information now as it is of importance to me."

"SMITH."

On July 26, 1917, the defendant cabled me:

"No decision stock second Newbuilding but shall probably keep the boat myself."

As a matter of fact, I never owned any stock, or acquired any stock in the company that took over hull one hundred and fifty-four, if any company ever took her over. She was commandeered by the Government in August, 1917, although I continued to co-operate in her construction, and give such information and [61—38] assistance as was in my power in connection with it. The vessel was commandeered by the United States Shipping Board under their letter, dated August 24, 1917, and I continued to send cablegrams to Mr. Lindvig con-

(Testimony of C. Henry Smith.)

cerning this matter during September, and to correspond with the United States Shipping Board in regard to it. In my account to Mr. Lindvig of October 15, 1917, I included the following items:

"Office remuneration for handling contract Union Iron Works account hull one hundred and fifty-four, attending to payments and etc., ten thousand dollars."

The "Regulus" was contracted in September, 1915, and completed on April 1, 1917.

Q. What was her market value at the time she was completed, the "Regulus," on the first day of April, 1917?

Mr. FRANK.—I object to it as immaterial.

The Court thereupon sustained said objection, to which ruling counsel for defendant duly excepted, and said exception is hereby designated

EXCEPTION No. THREE.

Q. What was the market value of the "Romulus" at the time she was completed?

To this question counsel for plaintiff objected as immaterial.

The Court thereupon sustained said objection to the question, and to this ruling of the Court, the defendant duly excepted; and said exception is here designated

EXCEPTION No. FOUR.

At the time that the "Regulus" was constructed, I received from Mr. A. O. Lindvig a copy of his report to the stockholders of the "Regulus," which gives a statement as to her costs 31 and a statement

(Testimony of C. Henry Smith.)

of her operations for the year 1917—April 1st, to [62—39] December 31st.

It is admitted that this report is an exact copy of the report received by Mr. Bjarne Lindvig, at present the agent of A. O. Lindvig in San Francisco, and which was also received by Mr. Bjarne Lindvig from Mr. A. O. Lindvig.

This report reads:

**Defendant's Exhibit No. 50.**

"REPORT FOR THE YEAR 1917 (4/1—12/31).

"The company 'Pacific' Limited, was established at a meeting of November 23, 1916, with a capital of Kr. 950,000.00 paid in full, in order to purchase the contract for a 6000 ton steamer built at the Union Iron Works, San Francisco, at a price of $450,000.00, for delivery in December, 1916.

"As the ship was contracted for a single decker, an additional sum had to be paid for furnishing a tween-deck. Wireless telegraph as well as various other extras, were also arranged for. The total cost of the ship was Kr. 1,856,329.41.

"To cover the amount at a 5½% loan of Kr. 600,000.00 was obtained from the Soreke Skibs Hypothenkbank for a mortgage on the ship. The balance was covered by cash credit in Andresens Bank a/s.

"The delivery of the ship was somewhat delayed (partly on account of strikes), and it was not taken over until April, 1917. The builders paid $10,000.00 as a compensation for the late delivery.

"The ship, which was named the 'Regulus,' immediately commenced loading general merchandise in San Francisco, bound for South American ports, as far as Valparaiso. It brought back a full cargo of Nitrate, and has since been running regularly between Puget Sound, San Francisco and South America.

"The voyages have been made without any serious accidents, and the ship has completed 2½ round trips during the three-quarters of a year it has been running.

"C. Henry Smith acted as Agent in San Francisco until October 1, 1917, when the A. O. Lindvig Company established their own office in the city.

"The freight rates southbound increased considerably during the year, especially the last months; for instance, the greight amount for southbound trip in September, amounted to $147,000.00 against $178,-000.00 in December, and there is, at the present time, apparently no sign of a decrease in the rates. [63—40]

"For the northbound voyages, the ship has been on a contract for $13.75 per ton on nitrate to San Francisco, with a small additional payment for discharging up north. The contract will expire about May, 1918, and thereafter we can expect a raise on these rates also.

"A Dispute has unfortunately arisen with the former agent, C. Henry Smith, as Mr. Smith withheld about $52,000.00 of the collected freight, to cover various commission charges, which we con-

sider him absolutely not entitled to. The dispute will probably be settled this summer.

"As shown by the following statement, the ship has earned a total freight of Kr. 2,033,983.36, with a net profit of Kr. 1,096,420.32. After deducting interest charges, registration fee, etc., the money at disposal amounts to Kr. 1,012,346.65, which will be disposed of as follows:

| | |
|---|---|
| Written off on the ship | Kr. 256,329.41 |
| Reserved for boiler & survey funds | 100,000.00 |
| Reserved for taxes for 1917 | 350,000.00 |
| 30% dividend to the shareholders | 255,000.00 |
| Carried into new account | 51,017.24 |
| | Kr. 1,012,346.65 |

"The 30% dividend was given on January 2d, this year.

"Due to the low exchange on dollars, the money has not been transferred to Norway, but deposited in a San Francisco bank. At the end of the year this deposit amounted to $284,812.83. At the same time we had debts in the Andresens Bank A/S, amounting to Kr. 560,422.31. The mortgage has been reduced with 5% viz: Kr. 30,000.

"The annual stockholders' meeting will take place at my office Sjofartsbygningen, Thursday, April 25, at 1:00 P. M.

"Kristiania, April 11, 1918.

"A. O. LINDVIG."

(Testimony of C. Henry Smith.)

Cost of the S.S. "REGULUS."

Contract price $450,000.00—Kr. 1,630,500.00.

| | |
|---|---|
| Putting in 'tween-decks, various extras and improvements outside the contract—kr. 204,229.41..... | 204,229.41 |
| Commission for contracting the ship, charged by C. Henry Smith $6000.. | 21,600.00 |
| | 1,856,329.41 |

[64—41]

(The document is here marked Defendant's Exhibit 50.)

The commission charged by me for contracting and supervising the construction of the "Regulus" was 1¼ per cent of her contract price. This is a reasonable charge.

I also charged a commission of 1¼ per cent of the contract price of the "Romulus," known during the time of her construction as Hull 154.

Between December, 1915, and September, 1916, I obtained a number of options for Mr. A. O. Lindvig for the building of 6,000 ton vessels by various yards here, and we finally came to the conclusion of closing this contract for the construction of Hull 154, as the "Romulus" was called during the time of her building. Both the "Romulus" and the "Regulus" were built on the Oakland Estuary, and I went over there a number of times and it occupied a great deal of my time. All of the time that these vessels were building I had to go over there and be in conference with the inspectors and

to watch the specifications, so it took up a great deal of my time.

On September 4, 1916, the plaintiff cabled me:

"26000 September 1917 Union Iron Works sistership ours We confirm purchase 7775000 dollars less 2½ per cent division owners stop Penalty bonus minimum $500 dollars per day clean terms."

On September 5th I cabled the plaintiff through the Trade Bureau at Kristiania:

"Inform Lindvig 6000 September 1917 confirmed by Union Iron Works 775,000 less 2½ per cent."

On September 15, 1916, as representing the plaintiff, I entered into the contract with the Union Iron Works for the construction of Hull 154. [65—42]

AGREEMENT made this 5th day of September, 1916,

BETWEEN

the UNION IRON WORKS COMPANY, a corporation organized and existing under the laws of the State of New Jersey, party of the first part, hereinafter called the "BUILDER"

AND

C. HENRY SMITH, INC., (as representing A. O. LINDVIG of Christiania, Norway), party of the second part, hereinafter called the "OWNER,"

WITNESSETH:

That the parties hereto, each in consideration of the agreements of the other, agree as follows:

FIRST: The Builder agrees to build, equip and deliver to the Owner a single screw cargo vessel, in accordance with the specifications and drawings signed by the parties hereto, which specifications and

drawings are to be taken as part of this contract, as fully as though set forth herein at length; it being understood that whatever may be necessary to complete anything coming within the specifications although not particularly mentioned or although imperfectly or insufficiently described therein, shall be supplied or furnished by the Builder as if the same had been particularly specified; and that all materials are to be the best of their respective kinds and that all workmanship is to be strictly first class and that both materials and workmanship are to be in all respects such as shall be approved by the representative of the Owner.

It is hereby understood and agreed that the steamer herein contracted to be built shall be, as nearly as possible, [66—43] a duplicate of the steamer now under construction at the Alameda Plant of the Builder for C. Henry Smith, Inc., and known as Hull No. 16; and the specifications and drawings referred to above shall be similar to those governing the construction of said Hull No. 16.

SECOND: Should the Owner at any time during the progress of the work request any deviations from said specifications and drawings, the same shall be made, and shall in no way affect or make void the contract; should such deviations involve additional expense, the amount of such additional expense shall be added to the contract price; should the deviations reduce the expense, the difference shall be deducted from the contract price. No new work shall be considered as extra work unless so

agreed in writing by the Builder and the Owner before the commencement thereof.

THIRD: Trial to determine the working of the machinery and the speed of the steamer will be made by and at the expense and risk of the Builder, except as to fuel, which shall be furnished by the Owner. Preliminary or dock trials under steam are to be made to insure that the whole of the machinery, is in proper adjustment and working order; the trial trip and other trials to be made in accordance with the specifications.

FOURTH: The Builder binds itself to make good all defective workmanship or material that may develop within three months after the date of the delivery of the steamer to the Owner, provided, however, that in order to satisfy itself that such defects arise from defective material or workmanship, and not from mishandling, the Builder shall [67—44] be allowed to have a representative on board the steamer who shall be acceptable to the Owner and who shall have free access to all parts of the steamer and its machinery. The Owner will provide said representative with free berth and meals during the entire time he remains on the steamer.

FIFTH: The Builder engages, at its own risk and cost, to deliver the steamer, safe and uninjured, complete as herein stated, at San Francisco, California, into the charge of the persons appointed by the Owner to receive it, on or before the 30th day of September, 1917; but due and reasonable allowance is to be made for any unavoidable delays in the completion of the steamer arising from devia-

tions from the specifications requested in writing by the Owner or from unfavorable weather preventing power speed trials, fires, accidents, strikes, acts of God, or a public enemy, or other cause beyond the control of the Builder. In the event of the steamer not being so delivered within said time, the Builder agrees to pay to the Owner the sum of Five Hundred Dollars ($500.00) as and by way of liquidated damages, for every day beyond the date named for delivery, until the actual delivery of the steamer provided, that the delay shall not have resulted from the causes aforesaid, in which case an extension of time shall be made, such extension to be mutually agreed upon between the Builder and the representatives of the Owner. In case of delivery before the date aforesaid, the Owner will pay a premium of Five Hundred Dollars ($500.00) for each day between the delivery and such date.

SIXTH: The total purchase price to be paid for said steamer, complete as herein agreed, shall be Seven Hundred and Seventy-five Thousand Dollars ($775,000.00) in gold coin [68—45] of the United States of America, and the Owner will make payments to the Builder at its office in the City and County of San Francisco, California, as follows:

10% on execution of this contract
10% when keel laid
10% when framing started
10% when plating started
10% when vessel fully plated
10% when upper deck laid
10% when launched

10% when boiler in ship
10% when dock trial is made
10% on delivery of vessel,

provided that the Owner be shown to its satisfaction, before making any of said payments, except the first, that the Builder has discharged all indebtedness for labor and material employed upon or used in connection with the building and equipment of said steamer and that no *lines* upon said steamer or material in favor of workmen, materialmen or others are in existence. No partial payment, except the first, to be made unless with the approval of the representative of the Owner that the rate of progress in the building of said steamer justifies such partial payment. Payment for all extras, less credits for any deductions, shall be made in cash in like gold coin upon the completion and delivery of the steamer. No partial payments made by the Owner hereunder shall be evidence of performance by the Builder, in whole or in part, and the making of such partial payment shall in no way estop the Owner from thereafter asserting any right or remedy accruing to it because of failure of the Builder to deliver the completed steamer in accordance with the terms hereof.

Should said steamer be completed and ready for delivery, as called for in this contract and the plans and specifications referred to herein, before September 30, 1917, then and in that event any balance of the contract price. [69—46] remaining unpaid at such time shall then become due and payable to-

gether with the final payment of $77,500.00 in the foregoing schedule.

The title to said steamer and all materials acquired to the Builder for use in connection with the building of said steamer shall pass to and vest in the Owner, whenever, and to the extent that, the same shall be paid for as aforesaid. All risk of loss, however, until actually delivered, shall be upon the Builder.

At all times during the construction of the steamer and until the same shall be finally delivered to the Owner, the Builder, shall at its own cost and expense keep the said vessel insured against any damage by fire, water, launching or accident of any kind, in an amount at least equal to the partial payments that shall have been made by the Owner, the loss to the extent of such partial payments to be payable to the Owner and the insurance policies to be delivered to the Owner.

The Builder agrees to hold the Owner free and harmless from any and all liability for any claims for personal injuries or death resulting to any person or employee, other than representatives of the Owner, upon or about or in connection with the construction and trial trips of said steamer.

SEVENTH: The Builder shall, at the completion of the steamer, obtain and deliver to the Owner, the builder's certificate of the steamer, wherein the Owner shall be declared to be the party on whose account the steamer has been built, and shall also obtain and deliver such official papers as may be required by the laws of the United States, and the

Society in which the steamer is registered. [70—47]

EIGHTH: Any and every dispute or difference which shall arise between the Builder and the Owner, respecting their rights and obligations hereunder, shall be settled by arbitration as follows: Either party may by writing, delivered to the other party, state any such dispute or difference and name one arbitrator to act in the settlement of the same; within ten days the other party shall by writing delivered to the party first acting in the matter, name a second arbitrator; the two arbitrators so appointed shall, within ten days after the appointment of the second arbitrator, unless they agree as to the settlement of the dispute or difference, appoint a third arbitrator. The decision of two arbitrators shall be final and binding on both parties. The method of hearing and determining the matter in dispute shall be fixed by the arbitrators or by any two of them. All the expense of said arbitration, including the compensation of the arbitrators, shall be paid as determined by the arbitrators. Notwithstanding the existence of any dispute or difference or the pendency of any arbitration, the steamer, together with the Builder's certificate, shall be delivered to the Owner whenever the Owner shall require possession thereof and gives written notice that it stands ready and willing to pay to the Builder the balance of amount due under this contract.

If, however, such dispute or difference involves any claim by the Builder for additional compensation from the Owner beyond the contract price, the Owner

shall pay such sum to the Builder prior to the delivery of the steamer, or shall secure the Builder therein by good and sufficient surety bond pending the decision of the arbitrators. Neither [71—48] such payments nor the furnishing of such bond in order to obtain possession of the steamer, nor acceptance of the steamer, shall in any respect prejudice the right of the Owner to recover damages for failure of the Builder to deliver said steamer in accordance with the terms hereof.

NINTH: If during the progress of the work the Builder at any time should become insolvent, or any of its property should pass into the hands of a Receiver, or if it should unreasonably suspend work upon said steamer, the Owner shall have the right to enter upon the premises of the Builder and take possession of said steamer, and thereafter cause it to be completed in accordance with the terms hereof, at such place or places as it may elect. If the cost of the completion of said steamer, (including all expenses connected with the taking of possession thereof) plus all advances made to the Builder, shall be less than the contract price, the difference shall be paid to the Builder or its representatives; and, on the other hand, the Builder shall be liable for any additional cost to the Owner by reason of the taking possession of the steamer and the completion of the work. The right in this paragraph given shall be considered cumulative, and shall not in any way limit any other rights or remedies existing in favor of the Owner.

The Building guarantees that none of the devices or anything used in or about the construction and

equipment of said steamer infringes any patents or patent rights and agrees to indemnify and save harmless the Owner from any suits, judgments or claims whatsoever for infringements of any patent or patent right; the Builder agreeing in the [72—49] event of a suit being brought against the Owner, upon notice being given to the Builder that it will have its lawyers defend such suit without cost to the Owner.

IN WITNESS WHEREOF, the parties hereto have hereunto caused their corporation names to be hereunto subscribed and their corporate seals to be affixed by their respective officers thereunto duly authorized. Executed in duplicate.

UNION IRON WORKS COMPANY,
JOHN A. McGREGOR,
President.
ARNOLD A. FOSTER,
Secretary.
C. HENRY SMITH INC.,
C. HENRY SMITH,
As Agents for A. O. Ludwig. [73—50]

I cabled to Mr. Lindvig September 12th as follows:

"Statsraad Lindvig,

"Kristiania, (Norway).

"Governor Forbes' owners refuse to deliver here will accept 340000 at Manila delivery 10 days after approved transfer by Government 10 per cent payment on signing contract suggest vessel be accepted six weeks after transfer instead if you wish to send out officers etc. telegraph stop 30000 received contract 6000 tonner mailed today.

"SMITH."

Under date of September 12, 1916, I wrote the plaintiff as follows:

"6000 tonner—Sept. 1917 delivery—Sistership Hull 16, building Alameda Branch Union Iron works Company.

"According to cables exchanged and your confirmation dated September 4th, reading as follows:

"'6000 September 1917 Union Iron Works Sistership ours. We confirm purchase 775,000 dollars less 2½ per cent. division owners stop Penalty bonus minimum 500 dollars per day clean terms.'

"We have signed contract with the Union Iron Works Company, which we are enclosing herewith for the 6000 tonner which is in every respect sistership of the other 6000 tonner building for your account, price $775,000.00 less 2½ per cent, to the owners, which we have arranged for with the builders.

"We have also made a payment of 10 per cent. receipt for which please find enclosed, and have credited your account with $30,000.00 which we received by cable today."

The "Romulus" was a sistership to the "Regulus," and the "Regulus" during construction was known as Hull 16, but the contract price of the "Regulus" was $450,000.00, while the contract price of the "Romulus" was $775,000.00. The Difference in these contract prices was due to the rising value of materials during the interval.

On September 13, 1916, I cabled Mr. Lindvig as to Hull 154: [74—51]

"New contract 6000 tonner eventually stock desired about $50,000.00."

This was stock desired by me in the "Romulus."

Said cable further contains the following:

"Governor Forbes have telegraphed owners will accept delivery at Manila six weeks after approved transfer 10 per cent escrow money."

Under date of May 10, 1917, the plaintiff wrote me:

"New 6000 Tonner. According to the information received here, through the Legation at Washington, from Solicitor Haight, it is presently difficult to draw any conclusion as to how such tonnage will be treated by the American authorities. I expect it will not make any difference, if I should at this stage declare that I agree to sail her under American flag, or if I should not trouble about this thing at all. According to the information you have given me, I consider that it would in any case not be a difficult matter to arrange the formalities to sail her under American flag. In case you are able to obtain any information, which may be of use to me, please communicate me through the Legation at Washington. I consider it is not impossible that transfer to Norwegian flag may be ultimately be arranged, on the same terms—for instance—as arranged for the 'Regulus'."

In May, 1917, I found that there had been a delay in delivery to the Union Iron Works of the plates necessary for the construction of this vessel, and I took the matter up with the United States Shipping Board, and succeeded in having the shipment of plates expedited. [75—52]

The following document was introduced in evi-

dence, having been produced by plaintiff on request of defendant:

"July 3, 1918.

"UNITED STATES SHIPPING BOARD

TO

"A. O. LINDVIG,

"Kristiania, Norway,

"For disbursements, account building Hull No. 154, known as SS. 'ROMULUS,' Commandeered by the United States Government.

| | |
|---|---|
| UNION IRON WORKS, | |
| Payments on building contract..... | $232,500.00 |
| EDWARD S. HOUGH, | |
| Services rendered, superintending building ship ..... | 1,250.00 |
| C. HENRY SMITH, | |
| Cost of cables regarding building of ship and contract, to and from Kristiania, Norway..... | 2,000.00 |
| C. HENRY SMITH, | |
| Remuneration for procuring and handling contract, Union Iron Works, attending to payments, etc. | 10,000.00 |
| C. HENRY SMITH, | |
| Legal Fees, Postage stamps and incidental expenses in connection with building of ship..... | 500.00 |
| NATHAN H. FRANK, | |
| Services rendered, matter of proposed requisition of said vessel..... | 800.00 |
| A. O. LINDVIG, | |
| Expenses of Inspector Hvoslef..... | 1,876.50 |
| | $248,926.50 |

Direct Examination of Defendant (Continued).

The accounts submitted by me to the plaintiff are absolutely correct.

Mr. MOORE.—Q. Mr. Smith, I would ask you to state what, if anything, you had to do with the purchase for Mr. Lindvig of the "Governor Forbes"?

A. Well, I purchased the steamer and I took the responsibility for inspection and classification that she was as represented, and I delivered the steamer [76—53] to him.

I purchased the "Governor Forbes" for $340,000.00 for Mr. Lindvig, charging him a commission of two per cent, or $6800.00. I not only purchased the steamer, but I took the responsibility for inspection and classification that she was as represented, and she was then at Manila, and I delivered the steamer here in San Francisco, after arranging for the transfer of her flag while she was at the Philippines.

On August 18, 1916, I cabled the plaintiff:

"Statsraad Lindvig,

"Kristiania (Norway)

"Governor Forbes offered firm 350,000 dollars plus 2 per cent. commission prompt delivery now Manila subject approval Government highest class French Veritas will retain class four years. Vessel well kept. Shall we accept. Cable.

"SMITH."

On September 7, 1916, the plaintiff cabled me:

"According your telegram 5/9 presume owners Governor Forbes willing deliver steamer Frisco 350,000 dollars which preferable calculate her avail-

able there end October. Telegraph confirmation.

"LINDVIG."

On September 8, 1916, I cabled the plaintiff:

"Governor Forbes owners accepted price three hundred forty thousand delivery Manila September October subject approval Government transfer escrow money ten per cent. according your telegram we have offered three hundred fifty thousand delivery here believe latter best arrangement as owners cannot now guarantee transfer."

On September 12, 1916, I cabled the plaintiff:

"Governor Forbes owners refuse to deliver here will accept 340,000 at Manila delivery 10 days after approved transfer by Government 10 per cent payment on signing contract suggest vessel be accepted six weeks after transfer instead if you wish to send out officers etc., telegraph stop 30,000 received contract 6000 tonner mailed today."

On September 13, 1916 I cabled to Mr. Lindvig, in which the following occurs: [77—54]

"New Contract 6000 tonner eventually stock desired about 50000 dollars."

This was stock desired by me in the Romulus.

Said cable further contains the following:

"Governor Forbes have telegraphed owners will accept delivery at Manila six weeks after approved transfer 10 per cent escrow money."

On September 15, 1916, I cabled the plaintiff:

"Governor Forbes owners accepted 340,000 dollars payable as follows 10 per cent on closing of contract to be held in escrow balance on delivery not exceeding

six weeks after approval by government stop please remit 30,000 by cable."

On September 15, 1916, the plaintiff cabled me:

"'Governor Forbes' confirmed provided you arrange send crew take steamer to Frisco will send Captain and officers Frisco telegraph when transfer and crew order will then remit 10 pc also telegraph how far work new building advanced."

On September 19, 1916, plaintiff cabled me.

"Ordered Andresens Bank remit thirty thousand dollars account 'Governor Forbes.'" [78—55]

**Defendant's Exhibit No. 4–G.**

THIS AGREEMENT, Made this 19th day of September, 1916, by and between YNCHAUSTI Y CIA, a copartnership, hereinafter sometimes termed Seller (acting by its agent Welch & Company), party of the first part, and A. O. LINDVIG, of Norway, hereinafter sometimes termed Purchaser, (acting by his agent C. Henry Smith, Incorporated), party of the second part;

WHEREAS, Ynchausti y Cia, a corpartnership, is the sole owner of all and every part of the American Steamer "Governor Forbes" and is desirous of selling said steamer to A. O. Lindvig; and

WHEREAS, said Steamer is a steel vessel burning coal as fuel, with double bottoms suitable for carrying oil as fuel;

NOW, THEREFORE, THIS AGREEMENT WITNESSETH that in consideration of the sum of Ten Dollars ($10.00) paid by the party of the second part to party of the first part, receipt whereof is

hereby acknowledged by party of the first part, and in consideration of the grants, covenants and engagements herein made, the parties hereto hereby do covenant and agree, each to and with the other, as follows, to wit:

1. The Seller agrees, for the consideration of Three Hundred and Forty Thousand Dollars (340,000), gold coin of the United States of America, payable as hereafter stated and upon the terms hereinafter stated, to sell, assign, transfer, convey and deliver unto the Purchaser, his nominee or assigns, by good and indefeasible title, free and clear of all incumbrances, indebtedness and liabilities of every kind and nature, including all liens, whether actual or contingent, and including all claims for average, the said Steamer "Governor Forbes," together with all of her engines, boats, boilers, tackle, apparel, furniture, equipment and appurtenances thereunto appertaining and belonging, on board or stowed on shore in use or held as extras. [79—56]

2. Subject to his right of inspection and refusal after inspection, as hereinafter set forth in paragraph Nine (9) of this agreement, and subject to the terms hereinafter stated, the Purchaser agrees to purchase from the Seller the said Steamer "Governor Forbes," together with all of her engines, boats, boilers, tackle, apparel, furniture, equipment and appurtenances, thereunto appertaining and belonging, on board or stowed on shore, in use or held as extras, for the sum of Three Hundred and Forty Thousand Dollars ($340,000) in gold coin of the United States of America.

3. The Seller guarantees that since July 15, 1914, no German individual, firm or corporation has owned any interest whatsoever in said Steamer.

4. The Seller, on or before October 10, 1916, is to secure the consent necessary from any and all public authorities to transfer and convey the entire interest of every kind and nature in said Steamer to Purchaser absolutely. Said consent, or a certified copy of an order or letter giving said consent, shall be deposited with the Hongkong & Shanghai Banking Corporation at Manila, P. I., immediately after said consent is given. Notification that said consent has been secured and delivered shall be given at the same time by cable message to said C. Henry Smith, Incorporated, at San Francisco.

5. Within five (5) days after said consent is granted, said Seller shall bring said Steamer to the Port of Manila, P. I., and shall keep the same in said port for at least five (5) days after notification of the arrival of said Steamer at said port has been given to C. Henry Smith, Incorporated, at San Francisco. During said five (5) days after said notification said Purchaser by its agents, delegates, or surveyors shall have the right, at any and all times, to make full inspection of the condition of said Steamer.

6. Within five (5) days after said notification of [80—57] arrival to C. Henry Smith, Incorporated, Seller shall deposit with the Hongkong & Shanghai Banking Corporation at Manila, P. I., a Bill of Sale lawfully conveying the entire ownership of said Steamer to Purchaser. Said Bill of Sale shall be held by said Hongkong & Shanghai Banking Corpo-

ration upon the terms and conditions hereinafter stated.

7. Before the time that said Bill of Sale is deposited the Seller, by due meeting of its copartners, shall have the conveyance of said Steamer to Purchaser fully authorized and approved in a manner satisfactory to attorney for Purchaser.

8. Purchaser, within five (5) days from the date hereof, shall deposit with the Bank of Italy, in San Francisco, California, Thirty-four Thousand Dollars ($34,000), the same to be held upon the terms and conditions hereinafter set forth.

9. In the event that the Purchaser, after the said inspection set out in paragraph Five (5), is not satisfied with the condition of said Steamer or with the title of Seller to said Steamer or with the legal effect of the said documents deposited with the Hongkong & Shanghai Banking Corporation by Seller, conveying title to said Steamer to Purchaser, then the Purchaser, within five (5) days after the period set out for the inspection of the Steamer, shall notify by letter, telegram or cable, the said Bank of Italy, the Hongkong & Shanghai Banking Corporation at Manila, P. I., and Welch & Company at San Francisco, that the Purchaser is not satisfied with the condition of said ship or with the title of Seller to said Steamer or with the legal effect of the aforesaid documents, and that Purchaser desires to terminate this agreement. Upon said Notification to said three corporations, this agreement and the effect thereof shall be absolutely terminated. In case Purchaser does not so

notify said three (3) corporations as aforesaid, then or before the forty-second (42nd) day after the consent [81—58] mentioned herein in paragraph four (4) hereof has been given and said notification thereof cabled to said C. Henry Smith, Incorporated, Purchaser shall deposit with the said Bank of Italy three Hundred and Six Thousand Dollars ($306,000) in addition to the Thirty-four Thousand Dollars ($34,000) previously deposited. Said money shall be held for the purpose hereafter set forth.

10. Upon the receipt of said Three Hundred and Forty Thousand Dollars (340,000) in all from the Purchaser as aforesaid, said Bank of Italy shall, by cable, notify said Hongkong & Shanghai Banking Corporation at Manila, P. I., that said money has been received and that said Hongkong & Shanghai Banking Corporation shall deliver to the order of Purchaser possession of said Bill of Sale and the other documents deposited with it as aforesaid. Said Hongkong & Shanghai Banking Corporation shall within five (5) days after said notification of said deposit, hold said Bill of Sale and said other documents to the order of Purchaser, and the Seller shall, at the same time as said delivery of said documents is made, tender delivery of said Steamer to the order of Purchaser at Manila, P. I. Upon notification by cable from said Hongkong & Shanghai Banking Corporation that said Bill of Sale and other documents are held to the order of Purchaser and that delivery of said Steamer has been tendered to Purchaser, said

Bank of Italy shall at once hold said Three Hundred and Forty Thousand ($340,000) Dollars to the order of Seller. At the time said Steamer is delivered to Purchaser as aforesaid, it shall be in fully as good condition as it now is, reasonable wear and tear being excepted.

11. All moneys deposited in said Bank of Italy by Purchaser shall be held by said Bank to the order of Purchaser and may be withdrawn by Purchaser:

(a) Immediately after this agreement is terminated, as provided in paragraph nine (9) hereof. [82—59]

(b) On or after December 10, 1916, if said Bank of Italy has not by that time received notice from said Hongkong & Shanghai Banking Corporation of the tender of said Steamer to Purchaser as hereinbefore stated.

All documents deposited in said Hongkong & Shanghai Banking Corporation by Seller shall be held by said Bank to the order of Seller and may be withdrawn by Seller:

(a) Immediately after this agreement is terminated as provided in paragraph nine (9) hereof.

(b) On and after December 10, 1916, if said Hongkong & Shanghai Banking Corporation has not by that time received notice from said Bank of Italy of the deposit in said latter Bank of Three Hundred and Forty Thousand Dollars ($340,000) in all by Seller, as hereinbefore provided.

12. All documents or papers deposited with Hongkong & Shanghai Banking Corporation by

Seller in accordance with this agreement shall after their deposit, be open to inspection at all times by the Purchaser, his agent or attorneys.

13. Any action required to be taken herein by Purchaser may be taken by said C. Henry Smith, Incorporated, acting for Purchaser with equal effect; any action required to be taken herein by seller may be taken by said Welch & Company acting for Seller with equal effect.

14. Time is of the essence of this contract, and if either party fails to comply with each of the terms of this agreement within the times set our for the performance of the conditions thereof, then the other party may at its option declare this agreement broken and refuse to perform any further obligations on its part. Notification shall be made by the party exercising said option to the other party, and also to said C. Henry Smith, Incorporated, said Welch & Company, said Bank of Italy, and said [83—60] Hongkong & Shanghai Banking Corporation. After said notification all deposits of moneys or documents, made as provided in this agreement, shall be at once returned to the party giving such notification by the bank or other corporation holding said deposits. This paragraph shall not affect any right to damages for breach of contract by one party to this agreement against the other party.

15. This agreement shall be binding upon the heirs, administrators, executors, assigns and successors of the parties hereto.

(Testimony of C. Henry Smith.)

IN WITNESS WHEREOF the parties hereto, by their respective agents, have set their hands the day and year first above written.

_____,

By WELCH & COMPANY,

Its Agents.

By _____,

President.

Attest: _____,

Secretary.

_____,

By C. HENRY SMITH, INCORPORATED,

His Agent.

By _____,

President.

Attest: _____,

Secretary. [84—61]

(The document was marked Defendant's Exhibit 4–G.)

After the purchase there was a good deal of complication in regard to the transfer of the vessel. The lower court in the Philippines refused to transfer the vessel, and we had to appeal the case to the Supreme Court, and the Supreme Court held that the transfer should be made. Then we arranged for the taking of the delivery of the vessel and the payment for the vessel.

Q. What was the value of that vessel, the market value here in San Francisco, at the time of her delivery here in 1917?

The COURT.—Your claimed compensation is on

(Testimony of C. Henry Smith.)

the basis of a certain percentage, two per cent, is it?

Mr. MOORE.—Yes, sir.

The COURT.—On her purchase?

The WITNESS.—Yes, sir.

To this question counsel for the plaintiff objected as immaterial. The Court sustained said objection to the question, and to the ruling of the Court sustaining said objection, the defendant then and there duly excepted, and hereby designates said exception as

EXCEPTION No. FIVE.

Q. Now, your charge in respect to the "Sinaloa" salvage item is $3,165.27, and I want to take that item up next.

Mr. FRANK.—We will have to object initially to anything at all with reference to salving the "Sinaloa" because the "Sinaloa" was one of the vessels in the employ of the steamship line, and he being in that employ at that time, it was a part of his duty as general agent to take care of the vessels. [85—62]

The COURT.—I will tell you what I think would be the better way. I think you had best make to the Court a brief statement of the character of the evidence you propose to offer in support of this item, and the Court will then pass upon that as a statement—I mean pass upon the question then as to whether or no under that statement it is within or outside the lines of his contract.

Mr. MOORE.—I propose to show that on June

(Testimony of C. Henry Smith.)

14, 1917, the "Sinaloa" ran aground in a fog a little south of Cape Blanco, and that on June 15th Mr. Smith received a wire from the captain of the vessel to that effect; that on the same day he, Mr. Smith started a tug from Coos Bay, which was expected to arrive at the place where the vessel was in four or five hours; that he was further wired by the captain that he must have assistance the vessel was leaking badly, there was water in the afterhold, and that Mr. Smith left that same night for Cape Blanco with Captain Curtis of the Marine Underwriters, going overland to Eureka, and from there by boat north to the vessel at Cape Blanco; that before arriving he wired the captain he was sending men and cables and equipment; and that on July 11th, a barge was installed alongside the vessel and all of the gear was received; that he facilitated the saving of the ship; that he had a great deal of correspondence with the plaintiff in regard to her, and what should be done with respect to her, and in the adjustment upon her, and a great deal of correspondence with the people doing the salvaging operation; that there was a controversy as to whether the vessel should be towed to Portland or San Francisco; that the defendant insisted she be towed to San Francisco; and when there he submitted her to bids of the different ship building companies; that there were three bids given [86—63] for her repairs, the lowest being by the United Iron Works for $135,000.00 and the next lowest being for $200,000.00; and that the United

(Testimony of C. Henry Smith.)

Iron Works did not want to do the job because they were immediately afterward commandeered by the Government; and that Mr. Smith then took up the matter with the Shipping Board, and obtained a permit from the Shipping Board providing for the repairing of the vessel by the United Iron Works.

Mr. FRANK.—I have nothing to say excepting that it is incompetent and immaterial, the statement he has made.

The defendant then offered to introduce certain cablegrams, stating:

"It is for the purpose of showing services rendered by Mr. Smith in connection with the salvage of the 'Sinaloa' amounting to some $2,000, which represents 5% of the sum total of $60,000 that was paid out. I want to state the purpose. That was advanced by Mr. Smith, and showing the communications between himself and Mr. Lindvig during the course of that time and the requests that were made upon him by Mr. Lindvig, in the matter and the appointments by Mr. Smith and the revocation of the appointment by Mr. Lindvig as to the appointments made by Smith."

To all of which the plaintiff objected on the ground that it was incompetent and immaterial.

(To the WITNESS.)

Mr. MOORE.—You have examined these cablegrams? A. Yes, sir.

Q. Now, don't answer this unless the Court tells you you may. I will ask you to state whether the fol-

(Testimony of C. Henry Smith.)

lowing cablegrams were exchanged by you, between you and Mr. Lindvig. You cabling to him upon the subject of the "Sinaloa" and her then condition and what you were to do about it, and what he wanted you to do. Did you cable to him on June 16th, 1917, as [87—64] follows:

"Sinaloa aground near Cape Blanco in fog this morning have sent tug for assistance."

And again on June 17th, 1916.

"Alta sailed for Melbourne stop Sinaloa position very difficult stop broadside to the beach stop leaking stop ten feet water aft hold."

And did he cable you on June 19th, 1916?

"Wilcox Peck Hughes attending average Sinaloa."

And again on June 20th:

"Urgent Wilcox cable chances floating Sinaloa slight stop everything possible must be done to save her."

And thereafter on June 20th, 1916, did you cable him; and then he cabled you on June 22d?

"Kindly cable amount Sinaloa insured stop Smith now at ship stop after hold flooded no water forward stop discharging cargo onto barges."

"Steamer Sinaloa insured as follows seven hundred thousand kroners hull three hundred thousand hull interest hundred thousand freight interest stop understand now prospects save ship stop condemnation must be avoided if by any means possible."

And you cabled him June 21st:

(Testimony of C. Henry Smith.)

"Sinaloa appointed Johnson and Higgins adjusters stop they are agents for Skuld."

And he cabled you on June 23d?

"Steamer Sinaloa you must adhere to my instructions appoint Wilcox Peck & Hughes who are agents main hull underwriters stop should otherwise have had no objection employ Johnson Higgins."

You cabled him on June 23d:

"Believe Sinaloa may be floated according to experts stop assembling fuel equipment to go north stop vessel in a rather protected position during summer."

You cabled him on June 29th:

"Please insure ocean going barge sent to Sinaloa value fifteen thousand dollars." [88—65]

And he cabled you on July 2d:

"Covered hull insurance barge fifteen thousand dollars two per cent voyage Frisco to steamer Sinaloa therefrom to Puget Sound or Frisco."

You cabled him on June 30th:

"Please place insurance salvage equipments sent aboard Phoenix and ocean going barge to Sinaloa valued at twenty-five thousand dollars."

He cabled you on July 3d:

"Steamer Sinaloa referring your cables 29/6 and 30/6 we have insured two barges and equipment in all 40,000 dollars value is this correct."

We will take a ruling on those cables.

Mr. FRANK.—We admit, of course, that those cables passed between them. They may be set out

(Testimony of C. Henry Smith.)

in the record so that the record may be perfect, and we will make our objection on the grounds stated.

The COURT.—Under the construction I put on this contract that evidence is wholly immaterial.

The defendant duly excepted to the ruling of the Court sustaining said objection, and said exception is here designated.

EXCEPTION No. SIX.

The WITNESS.—(Continuing.) I disbursed $63,305.54 in the salvaging of the "Sinaloa."

The COURT.—You constantly had moneys of the plaintiff here coming in, I suppose?

A. Yes, sir, I did, but we had large disbursements, too.

Mr. MOORE.—Q. You had moneys on hand belonging to Lindvig at that time, did you?

A. Yes, sir, I had.

Q. And also what disbursements did you have, or what calls were made for that money?

A. There were constant disbursements. We had to pay the expenses at the Southern [89—66] ports and the disbursements for the steamers all of the time, and I was responsible for these disbursements while I was agent.

Q. I will ask you to state whether or not you arranged where the vessel should be brought to when she was taken away, or when she was floated.

Plaintiff's counsel objected to this question as immaterial and the Court thereupon sustained said

(Testimony of C. Henry Smith.)

objection, to which ruling counsel for defendant duly excepted, and said exception is here designated.

EXCEPTION No. SEVEN.

I made application to the United States Shipping Board at Washington in regard to a permit being issued for the repair of the vessel by one of the ship building yards here in San Francisco Bay.

For the return voyages of these vessels from South America, I as agent for plaintiff entered into yearly contracts for the carriage by these vessels of nitrate with the Dupont de Nemours. The last of these contracts entered into by me was dated July 10, 1917.

Q. Now, Mr. Smith, Mr. Lindvig had a contract, did he not, preceding this contract for the carriage of nitrates with the Dupont, which expired on June 1? A. Yes.

Q. You had no other contract with the Dupont at that time for the carriage of nitrate over these lines?

The COURT.—Yourself individually?

A. No.

Mr. FRANK.—Or otherwise?

A. No. This contract covered the carrying of forty thousand tons during the year June 1, 1917, to June 1, 1918. Before entering into this contract the defendant cabled me to first obtain the consent of the British Admiralty and meantime to fix for only one voyage, but I considered such a

(Testimony of C. Henry Smith.)

course impracticable and unnecessary, [90—67] and was so advised by W. A. Simonton, the Traffic Manager for the DuPont de Nemours Company. He said it would be a long time before the matter could be taken up by our Government and the consent of the British Admiralty secured, but that if any trouble should be made, there would be no difficulty about keeping the vessel on the run, inasmuch as they were carrying nitrate, to the Dupont de Nemours Company, at San Francisco and at Tacoma, which [91—68] nitrate was being used in the manufacture of munitions of war.

I knew that the Government was advised of previous contract with the DuPont de Nemours Company, and favored a continuance of this business, and it was on the strength of the "Regulus" engaging in the carrying of this nitrate, that I was able to get her transferred to the Norwegian flag in April, 1917.

On October 31, 1917, I wrote the following letter to Captain P. Hvoslef:

**Defendant's Exhibit No. 4–Z.**

October 31, 1917.

"Captain P. Hvoslef, Representing, A. O. Lindvig,
"280 Battery St.,
"San Francisco, Calif.

"Dear Sir:—

"NITRATE CONTRACT.

"I hereby beg to inform you that I have charged commission on the total amount of Nitrate to be lifted under this contract, less what has already been car-

ried according to statements in the hands of Mr. A. O. Lindvig, Kristiania, Norway, or on the way, of which copies at your disposal. This charge will have to stand, inasmuch as you have not acknowledged that you intended to carry out the contract, and therefore have placed me in an embarrassing position towards the Dupont Company.

"I hereby beg to give notice that I require sixty (60) days in order to make arrangements to take over any portion of Nitrate which you are unable to lift or which you wish to be relieved of, subject to, of course, contingencies beyond control.

"Yours very truly."

(This letter was marked Defendant's Exhibit 4–Z.)

On October 6, 1917, I wrote the following letter to Mr. A. O. Lindvig:

**Defendant's Exhibit No. 5–A.**

"Oct. 6, 1917.

"Mr. A. O. Lindvig,

"Kristiania, Norway.

"Dear Sir:—

"DUPONT POWDER COMPANY. [92—69]

"Regarding your telegram to Mr. Hvoslef, that I acted without any instructions in arranging same, I must call your attention to my telegram of July 8th reading as follows:—

> " 'Dupont will not consider three months contract stop insist on yearly contract stop otherwise business off and will employ their own boats stop offer thirteen dollars seventy five cents stop dollars 13.75 stop will assist toward our Government and England if necessary.'

"Also your reply thereto of July 10th as follows:

> " 'Can only fix for one voyage at the time unless Dupont or American Government can get British Admiraltys approval for a longer period stop if this obtainable expect get our Government agree telegraph.'

"Inasmuch as I obtained a promise from the Dupont Company to assist toward the American Government, I could not get any other meaning out of the cables exchanged with you, that it would be satisfactory to close the contract. I also must call your attention to your letter of July 12th, in which you say that you are sorry that you cannot give clean authority to close the contract, meaning of course, without any strings to it. I cannot understand it any other way.

"All contracts will always be subject to the laws and regulations of the Norweigian Government at all times and the agreement is not binding upon you if the Government says 'No.' Otherwise I am personally responsible for this agreement made with Dupont Powder Company, and I shall carry it out myself, if you do not. Inasmuch as many cables are multilated when they arrive here from yours and also because the mail takes such a long time, it was impossible for me to go into further details.

"OPERATION OF SHIPS.

"I have now transferred this to your office, which I have been informed is now established here. Mr. Hvoslef called on me yesterday and I understand he arrived from Norway a couple of days ago, and I

transferred to him the Oil contract I made in September, 1915, for the SS. SINALOA AND BAJA-CALIFORNIA, and any other steamers owned or operated by me. This contract is on a basis of 65¢ per barrel. In view of the market of today, $1.30 and $1.40, it is a good contract. I also transferred the contract to him which I made with the Standard Oil Company about four(4) years ago and which expires the end of this year. You will understand that I have had no request from you to close or to make any contracts for fuel oil in your behalf. I enclose a copy of the contract for your perusal.

"REGULUS STOCK.

"This stock arrived here last month and I delivered [93—70] same to the United Engineering people. My lawyer told me that I had a chance to win the case against the United under the option; but that being an American citizen it might be a question whether I was a Norwegian interest, which is set forth in the option. He told me furthermore that you, yourself, being managing owner of the REGULUS have exercised the option, but I decided that if anyone was entitled to exercise such option, it was, of course, me and if I could not do it, it was only just that the United should have the stock. Therefore, I did not take the matter up with you.

"ACCOUNTS.

"I have paid the Union Iron Works $135,000.00 on account of the repairs of the SINALOA which will amount to, with extras and bonus, to about $145,000.00. As soon as I receive the bills from the Union Iron Works, I shall draw the remainder of the

credit, which you arranged with the First National Bank to pay. The salvage money which I have paid out amounts to about $60,000.00. I may say that it was very fortunate for the steamer that we obtained permission from the Government to have the repairs made, as at that time the Union Iron Works was taken over by the United States Government and the Union people claimed that they were not obligated to finish the contract. I have deposited what is due you as per GOVERNOR FORBES AND BAJA CALIFORNIA. Statements in the First National Bank to your credit and as soon as we have the accounts checked up for the SINALOA which sailed from Seattle on September 26th, of which you have been notified and also the General Statement and Salvage Statement.

"Yours very truly."

(The letter was marked Defendant's Exhibit 5–A.)

On November 21, 1917, I wrote the following letter to Mr. Lindvig:

**Defendant's Exhibit No. 5–D.**

"A. O. Lindvig, Esq., per B. Lindvig, Agent,
"280 Battery St.,
"San Francisco, Calif.

"Dear Sir:—

"Re: Commission for Procuring Dupont Contract.

"With regard to the item of October 12, $25,517.80 balance of commission for the contract to carry 40,000 tons of nitrate for the Dupont Powder Company, my understanding is that you are to carry the balance of the nitrate under the terms of the con-

(Testimony of C. Henry Smith.)

tract. [94—71] Apparently you hesitated at first under the impression that the contract was contrary to Norwegian law. On examination, it appears that it does not purport to charter any ship and could be performed in any vessels we might present and hence offends no Norwegian law. Your ratification by performing in part and by Mr. Hvoslef's statements we take to indicate your desire to perform the contract. This point of view is confirmed by advices from the Dupont Company.

"Very faithfully yours."

(The letter was marked Defendant's Exhibit 5–D.)

Mr. MOORE.—Q. Now, Mr. Smith, at the time that you made that contract, did you know and appreciate and believe that you would be responsible for the carrying out of it in the event Mr. Lindvig did not choose to do so?

Mr. FRANK.—I object to that as immaterial and incompetent.

The COURT.—I think I will let him answer that, I would like to know how he expected to carry it out.

Mr. FRANK.—We take an exception.

A. Yes, I did.

Mr. MOORE.—Q. Now, to answer the Court's question, how did you expect to carry it out if it was up to you to do so, in the event Mr. Lindvig did not want to?

A. I expected to get other vessels.

The COURT.—Q. Where would you get them, under the conditions prevailing at that time?

(Testimony of C. Henry Smith.)

A. They were building a number of wooden ships on the Coast, and I owned some ships myself.

Q. What were they?

A. They were sailing ships, and I was negotiating for auxiliary wooden ships at the time for the purpose of carrying out this contract.

Q. For the purpose of carrying out this contract?

A. Yes, in case Lindvig did not. [95—72]

Q. You expected all the time that Mr. Lindvig would go on and carry out the contract, didn't you, that is, that his ships would be used in that trade?

A. Yes.

Mr. MOORE.—Q. I will ask you to state whether or not when you found out that Mr. Lindvig was objecting to your having made the contract you made any effort or tried to buy these ships from him?

A. Yes.

On July 11th, 1917, I wrote the following letter to W. A. Simonton:

**Defendant's Exhibit No. 5–F.**

"July 11, 1917.

"Mr. W. A. Simonton,

"Traffic Mgr.,

"E. I. Dupont de Nemours & Co.

"Palace Hotel, G.D. San Francisco Cal.

"Dear Mr. Simonton:

"CONTRACT *NEST* YEAR

"I am now in receipt of a cable from the owners through the Norwegian Delegation at Washington, stating that the vessels cannot be fixed for more than

one voyage at a time. It develops that influence has been brought to bear with the object of having the vessels ready for the Atlantic service if necessary.

"In view of my having signed the agreement with you for the 40,000 tons to be lifted during the next year, it would be of importance that you take the matter up with our Government, so as to avoid any misunderstanding.

"Yours very truly."

(The document was marked Defendant's Exhibit 5-F.)

On July 9, 1917, I wrote the following letter to W. A. Simonton:

"July 9, 1917.

"Mr. W. A. Simonton,
"Traffic Manager,
"E. I. Dupont de Nemours & Co.
"Palace Hotel, San Francisco, Calif.

"Dear Mr. Simonton:

"I am sending you herewith contract and nine copies. I have not signed the contract as yet, as I wish you would look it over first. The changes that I have made [96—73] as follows, cover, Average per month 3400 tons, and 8000 tons instead of 5000 tons, discharge at Dupont 500 instead of 350, and delivery of Nitrate as fast as ship may receive at place of loading. Notice of distribution of cargo, twenty days instead of ten day. I hope you can see us through on this latter point, as with the embargo coming on it will be more difficult of course to handle south bound freight.

"Outturn weight to govern instead of bill of lading weight. Embargo clause inserted as agreed.

"I have not had a confirmation from the owners in Norway, but if you will assist me in getting an early delivery of the vessel now building at Union Iron Works Co., I think we shall be able to carry out the contract. Contract time from June 1st, 1917 to June 1st, 1918.

"Yours very truly." [97—74]

**Defendant's Exhibit No. 4–S.**

AGREEMENT between C. Henry Smith of San Francisco, Calif., (the carrier) and the E. I. Dupont de Nemours & Co. of Wilmington, Del. (the shipper), for the freighting of nitrate of soda in bags, by steamer, from ports in the Nitrate Range in the Republic of Chile, between Pisagua and Taltal, both inclusive, and San Francisco, Cal., and/or Dupont, Washington, and/or Powder Point, British Columbia.

1. The Shipper agrees to ship and the Carrier to provide tonnage for the Shipper's nitrate requirements for San Francisco, and/or Dupont, (Tacoma), and/or Powder Point, British Columbia, for the year June 1st, 1917—June 1st, 1918, amounting to Forty Thousand (40,000) tons, 10% more or less, in connection with the Norwegian steamers "Baja California," "Sinaloa," "Regulus," and the steamer now building at the Union Iron Works Co., to be completed September, 1917, delivery expected November 1917, and/or other steamers and motor vessels,

(tons of 2240 pounds always understood). Freight payable on outturn weights. Cost of weighing at the expense of Shipper.

2. The Carrier to supply tonnage at intervals of about Forty-five days, and agrees to give the Shipper at least Thirty (30) days notice on each occasion, of the name of the boat and approximate loading date. If after naming steamer and loading date, steamer is delayed for twenty days or more, the carrier is to reimburse the Shipper for any loss incurred by the shipper account of extra storage and/or insurance, occasioned by such delay, or Carrier may substitute another steamer.
3. When it is foreseen that the succeeding boat is likely to be delayed, the Carrier may call for Two monthly lots, or about together Eight Thousand (8,000) tons or 10% more or less, Carrier's option by giving the Shipper at least Thirty (30) days notice. In such cases the Shipper has the right then either to supply the Eight Thousand (8000) tons, or to release the Carrier from the obligation to provide tonnage in the time of respective vacancy in departure. Such additional shipment of Eight Thousand (8000) tons, if effected, would thereby anticipate the next regular shipment to the same extent.
4. The Shipper, direct or through his agents, is entitled to ship from any one safe nitrate port within the Taltal-Pisagua Range, both inclusive, two places between Iquique and Pisagua to

count as one port,—the port named above or two places between Taltal and Pisagua, but in loading this cargo ships are not to be sent out of geographical order, that is, they are to load first at the most Southerly port, and thence in geographical order. Cargo to be delivered alongside ship as customary for nitrate steamers, and loaded as fast as nitrate may be received by the ship.

5. Destination: San Francisco, Cal.

Upon notice to Carrier not less than Twenty (20) days before expected arrival of ship, at San Francisco, the Shipper is privileged to declare for Dupont (Tacoma) Wash. (or Powder Point), British Columbia, for a quantity of not less than Five Hundred (500) tons. At Dupont, or Powder Point, the consignee is to provide a safe berth, free of wharfage and without delay. Delivery to be taken according to the custom of the port for nitrate steamers.

6. FREIGHT RATE to San Francisco, Thirteen and 75/100 ($13.75) Dollars per ton of 2240 pounds, gross weight. The use of Dupont, (Tacoma) or Powder Point, B. C., to incur an extra freight of fifty (50¢) cents per ton on the quantity delivered there. Discharge not less than Five Hundred (500) tons at Tacoma, per day, and at San Francisco and Powder Point, as fast as Nitrate may be delivered from [98—75] ship. One-third of amount of freight payable on shipment of cargo.

7. Shipper responsible for Demurrage at the rate of Seven Hundred Fifty ($750.00) Dollars for

steamers "Baja California," "Sinaloa" and Fifteen Hundred ($1,500.00) for "Regulus" and new building, per day, for defaults in delivery at loading port or delays in discharge.

8. The Shipper is to have the privilege of shipping nitrate of soda by any steamer now under time charter to them or controlled by them, during the life of this contract, and such quantity as may be shipped on such steamer or steamers, thereby anticipates their next monthly shipments to the extent of that amount, figuring the monthly shipments to be 3,400 tons per month, if carrier fails to furnish steamer within specified forty-five days. However, the shipper is to give the carrier at least Sixty (60) days notice of their intention to use any of their time chartered or controlled steamers. Such shipments via any of Shipper's boats as named above, would be entirely for Shipper's account.
9. Other general conditions of current du Pont nitrate charter party to prevail. Adjusters in case of General Average to be appointed by Carriers for hull.
10. This engagement commences on the 1st day of June, 1917, and continues until the 1st day of June, 1918, inclusive.
11. Both parties may delegate to their respective Valparaiso Agents, the working out of shipping details and likewise to San Francisco, and/or Dupont, and/or Powder Point, the matter of discharging details.

12. The Ship has liberty to call at any ports, in any order to sail without Pilots, and to tow and assist vessels in distress, and to deviate for the purpose of saving life or property.

13. Should the Government place an embargo on foodstuffs, etc., which may prevent the Carrier to obtain southbound cargo, this contract will automatically cancel.

The Act of God, perils of the sea, fire, barratry of the Master and Crew, enemies, pirates, and thieves, arrests and restraints of princes, rulers, and people, collisions, stranding, and other accidents of navigation excepted, even when occasioned by negligence, default or error in judgment of the Pilot, Master, Mariners, or other Servants of the Shipowners.

Ship not answerable for losses through explosion, bursting of boilers, breakage of shafts, or any latent defect in the machinery or hull, not resulting from want of due diligence by the Owners of the Ship, or any of them, or by the Ship's Husband or Manager.

SIGNED IN TEN (10) COPIES, FOR A SINGLE PURPOSE.

Date—Jul. 10, 1917.

(Signed) C. HENRY SMITH.

E. I. DUPONT DE NEMOURS & CO.

By (Sgd.) W. A. SIMONTON. [99—76]

(This document was marked Defendant's Exhibit 4–S.)

The item of $2,049.65 is five per cent on the inward freight of the "Governor Forbes" on her inward voyage arriving at San Francisco on October 3d, or

(Testimony of C. Henry Smith.)

4th in 1917. She left Guayaquil in September 1917, with a cargo of cocoa.

Mr. MOORE.—Passing to another matter, Mr. Smith, which might be considered in this connection, you have retained, have you not, a suspense item of $5,000 to cover bookings made in your office and engagements prior to October 1 on outward bound freight? A. Yes.

Q. Just state what the fact was in that connection because it bears on the same matter?

A. Well, they took away all the records of freight booked which we had made, and when we wanted to look the matter up we had no book in the office and we asked them to return them and they said then they had not booked no cargo at all, and the correspondence would show they admitted taking the books and they then returned some of them.

Q. Is your claim in that connection that before October 1 the employees of your office who were going to go over to Mr. Lindvig's office were booking freight while still in your employ? A. Yes.

Q. For how long back had that condition of affairs been going on where they were booking freight in your office while still in your employ which was not to be loaded on board of vessels until after October 1? A. That was three or four months back.

On October 27, 1917, Mr. B. Lindvig, General Agent wrote me a letter, which reads in part as follows: [100—77]

**Defendant's Exhibit No. 4–Q.**

"We enclose herewith copies of bookings covering cargo contracted prior to October 1st, and will state further that our engagements here are open for inspection.

Our Mr. Silva states that he spoke to you about August 25th regarding bookings for October/November and you advised him that it was all right to go ahead and contract freight, that he could take the bookings over on the 1st of October, and the transfer was made accordingly.

"We cannot grant that you have a right to a credit on cargo that has not even been shipped and that will go forward well over the time that the change took place.

"Mr. Silva's intentions were not to put on a man in our office while he was still in your employ, but to resign and come over himself on September 1st. This he would have done had there been any question regarding business for shipments beyond October 1."

(The letter was marked Defendant's Exhibit 4–Q.)

I have nothing to do with the operation of the vessels, their outfitting, or their tackle, furniture, or repairs, or with the appointment of their matters, or the employment of their crews, or anything to do with the furnishings of provisions and stores, or with the preservation of proper certificates, or surveys, or their insurance, or management.

**Testimony of John A. Bishop, for the Defendant.**

JOHN A. BISHOP, a witness called on behalf of the defendant, testified as follows:

Direct Examination.

I am an average adjuster, connected with Johnson & Higgins, and have been engaged in that business for twenty-eight years, my business having been entirely that of an adjuster of averages and insurance.

Q. Your business has been entirely that of an adjuster of averages and insurance? A. Yes.

Q. You have no connection whatsoever with any steamship lines, and never had had?

A. No. [101—78]

Q. And know nothing about their business at all?

A. Except in a general way, as taught by experience in our own business.

Q. Simply as a matter of the adjustment of general averages between the insurance companies and the ship owners, where insurance is in question?

A. No; it is not confined to the question of insurance companies, Mr. Frank. * * *

A. The question of general average is not a matter between the ship owner and the insurance company, but a matter between the ship and cargo owner.

Q. Between the ship, cargo and freight?

A. Between the ship, cargo and freight.

Q. In other words, all the interests that are at risk at the time of an injury or damage to the vessel? A. That is correct.

(Testimony of John A. Bishop.)

Q. It is also carried into the insurance and depends on the insurance companies assuming the risk of the ship owner or whatever is insured?

A. It does not necessarily have any connection with insurance, Mr. Frank. The vessel may be insured, or the cargo may not be insured, and the question of general average arises irrespective of the insurance.

Q. It does not have any connection with the business of steamship companies, or with any particular fixed line of contracts, has it? The contracts that come before you are as varied as the days of the year, for instance. * * *

A. A general average is apart from contracts altogether.

Mr. FRANK.—Q. It has nothing to do with them?

A. It has nothing to do with the contracts. [102—79]

Mr. MOORE.—Q. Have you had occasion at numerous times to observe what is the practice, if any, with respect to allowance to general agents of reimbursement to themselves for services rendered in connection with salvaging of vessels where their contracts provides that they shall have a fixed percentage of the freight earned or carried?

A. I have had numerous instances.

Q. Numerous instances? A. Yes.

Q. Will you name a few of the instances that you remember in which you have made observation in connection with that practice or custom?

A. Williams, Dimond & Co., agents of the

(Testimony of John A. Bishop.)

American-Hawaiian Steamship Company, Leonard Gray, who was the agent for the Cosmos Line, E. C. Evans, agent for some British ship owners, Balfour Guthrie & Co., agents for the Harrison Direct Line. We have had several instances for Williams, Dimond, as agents for the American-Hawaiian Line. I suppose I could name at least from six to eight without going back on my records at all.

Q. Would you do that, please?

A. In the case of the "Alaskan," belonging to the American-Hawaiian Line, Williams, Dimond & Co., were the general agents on the Coast; she was on fire in San Diego in 1910.

The "Pennsylvania" was also on fire down near Panama, bound for San Francisco; the "Anubis," of the Cosmos Line, went ashore in, I think it was, 1908, near Santa Barbara, on San Miguel Island; Lennon Gray was the agent for the Cosmos Line at that time. The "Pleiades" was ashore on the Southern California Coast, belonging to the Luckenbach Steamship Company, Williams, Dimond & Company were the agents. The "St. Nicholas," a British vessel, was on fire bound in to San Francisco, Balfour, [103—80] Guthrie & Co., were agents; the "Queen Alexandria" struck on the Columbia River Bar, putting in to San Francisco; E. C. Evans, of San Francisco, was agent.

Q. I will ask you to state whether or not, in all the cases mentioned by you occurring with respect to the vessels named, of which Williams, Dimond & Co., were agents, whether or not in each and every

(Testimony of John A. Bishop.)

of those cases the general agent was allowed compensation for the services rendered by him in connection with those vessels?

To this question counsel for plaintiff objected as follows:

"Mr. FRANK.—I object to the gentleman's competency to testify upon the question of custom, and in the second place I object to the question substantively on the ground that the evidence as to custom that is offered cannot be introduced as tending to vary the terms of the contract before us; this is not a question between the cargo owners and the freight owners, and the ship owners, but is purely and only a question between the ship owner and his agent, on a private contract. * * * I object to the question, as before, both as to the competency of the witness, and to the competency of the testimony, even if this man were competent to testify. This is not a question of compensation between principal and agent, but it is compensation entirely between different interests, and under entirely different circumstances. It has nothing to do with this question."

The Court thereupon sustained said objection, to which ruling counsel for the defendant duly excepted, and said exception is here designated

EXCEPTION No. EIGHT.

Q. I will ask you whether or not it is the custom in all cases where the general agents render services in connection with the salvage of the vessel, to not only allow him from his principal a compen-

(Testimony of John A. Bishop.)

sation for the general services in connection therewith, but an allowance of 2½ per cent on the total amount [104—81] of disbursements in connection therewith, if the money be that of his principal, and 5 per cent of the money be that of himself.

To which question the counsel for the plaintiff then objected in same manner and upon same grounds as the objection last hereinabove set forth, and the Court thereupon sustained said objection, to which ruling counsel for the defendant duly excepted, and said exception is here designated

EXCEPTION No. NINE.

I will ask you, Mr. Bishop, what is the fact as to whether or not there is a uniform custom in San Francisco, and has been for twenty years last past, of allowing general agents of steamers and steamship companies, special compensation for their services rendered in connection with salvaging of vessels, and a commission of 2½ per cent upon moneys advanced by them, if the money belongs to the owners, and 5 per cent in cases where the general agency contract specifies 5 per cent as the compensation therein mentioned in respect to freight earned.

To said question counsel for the plaintiff objected on the ground that the witness is incompetent to testify on the question of custom; that the question does not refer to compensation between principal and agent, but to compensation entirely between different interests, and entirely different circumstances; that it is immaterial; and further, upon the ground that the question is leading; and further,

(Testimony of John A. Bishop.)

that the question presupposes that the agent is to be paid 2½ per cent out of the money that the owner pays, and the Court thereupon sustained said objection, to which ruling counsel for the defendant duly excepted, and said exception is here designated

EXCEPTION No. TEN. [105—82]

**Testimony of Wilfert Page, for Defendant.**

WILFERT PAGE, a witness on behalf of the defendant, testified as follows:

Direct Examination.

I am an avereage adjuster, connected with George E. Billings Company, and I identify this book which I hold in my hand as an adjustment of the general average and salvage expenses in connection with the wreck of the "Sinaloa."

The counsel for the defendant thereupon offered in evidence the entries contained on page 226 of said book, reading:

"$3,165.27, C. Henry Smith remuneration
for account 5% commission on
$63,305.54..... .... ..... ....$3,165.27"

To this offer counsel for plaintiff objected upon the ground that it is immaterial; that the general average account is not between plaintiff and defendant, but between different parties, viz.: ship, cargo and freight, none of which interests were in Mr. Lindvig; that it is outside of the issues, the counterclaim being a setoff based on services rendered, and not based upon account money had and received. The Court thereupon sustained said ob-

(Testimony of Wilfert Page.)

jection, to which ruling counsel for the defendant duly excepted, and said exception is here designated

EXCEPTION No. ELEVEN.

This is an adjustment of the general average and salvage expenses in connection with the wreck of the "Sinaloa." It was completed in August or September, 1918, and is printed or made with an electric pen, so that a number of copies are struck off. Copies of this book were turned over to A. O. Lindvig.

Q. You represented the cargo of the vessel, did you?

A. No. We were appointed by the charterers of the vessel.

Mr. FRANK.—Q. The Dupont Company, wasn't it? A. Yes. [106—83]

Mr. MOORE.—Q. I will ask you to state whether Mr. Lindvig ever thereafter or any member of his office, dissented from the item therein contained, the $3,165.27 allowed to Mr. Smith in connection with his services with respect to the salvaging of this vessel?

To this question counsel for the plaintiff objected as immaterial, and the Court thereupon sustained said objection, to which ruling counsel for defendant excepted, and said exception is here designated

EXCEPTION No. TWELVE. [107—84]

We were appointed by the Dupont Company. The vessel was carrying nitrate for the Dupont Company at the time she went on Cape Blanco.

(Testimony of Wilfert Page.)

Q. Was there any contribution to be made by the Dupont Company to the general average?

Mr. FRANK.—That is immaterial.

The COURT.—What is the purpose of this?

Mr. MOORE.—I want to show that so far as that cargo is concerned that Mr. Lindvig made demand upon that cargo based on the contribution made to the general average which would include the portion of the cargo through the payment of this item of $3,165.27 allowed to Mr. Smith.

The Court thereupon sustained said objection, to which ruling counsel for defendant duly excepted, and said exception is here designated

EXCEPTION No. THIRTEEN.

I did not have anything to do with the collection from the underwriters.

Q. So far as the cargo was concerned, do you know whether or not Mr. Lindvig has, in fact, collected from the cargo upon the basis of including in the general average this item of $3,165.27 allowed to Mr. Smith?

To which question counsel for the plaintiff objected as immaterial, and the Court thereupon sustained said exception, to which ruling counsel for the defendant duly excepted, and said exception is here designated

EXCEPTION No. FOURTEEN.

**Testimony of John McClelland, for Defendant.**

JOHN McCLELLAND, called as a witness for the defendant, testified:

I am an importing, exporting and shipping agent,

(Testimony of John McClelland.)

connected [108—85] with Henry Lund & Company. As a part of our business we have contracted for the building of ships and attending to the matter of payments. This has happened in three or four instances in the last several years. They were vessels built for the account of Norwegian owners; we simply contracted the vessels and supervised the payments. We did not actually superintend the building of any vessels, as we engaged engineers and surveyors to do that. We were acting as brokers. Brokers on the other side cabled us and asked us to quote them contracts for building, and we went to the builders and found out quotations for them and cabled them all the particulars of the specifications, the price, etc. We would give them a price, and, naturally, our commission would be included in that. If we gave any price that included our commission and the broker's commission on the other side. We gave the brokers on the other side a stated commission, and we got whatever we could out of it. All our charge was for brokerage in securing the contract.

I would consider a proper charge for the services of an agent, who would not only contract for the vessel, but watched out to see that the payments were properly made, and generally watched over the construction of the vessel, and attended to the transfer of her flag when the vessel was finally completed, in the case of a vessel the contract price of which was $450,000.00, I should think a proper

(Testimony of John McClelland.)

charge of five per cent would be a very reasonable percentage.

In the case of a vessel, the contract price of which was $775,000.00, the contracting for and general supervision over her construction, where he did not advance funds, but merely saw that the payments were made, the money being furnished by the owners would be one and a half per cent as a minimum—one and a [109—86] half to two per cent.

Cross-examination.

In the case of my answer of five per cent, the agent was not advancing the money himself, but was probably taking the trouble to go to the bank, and attending to the filing of the papers, but another reason for making the percentage larger was because the cost of the vessel was so much less. The percentage increases as the value of the vessel decreases. Where the price has been $775,000.00 or approximately that, we have got three per cent.

There is absolutely no standard commission to be charged, absolutely none. It is just a question where, if you have to do any cabling you can add on as much as you want. Naturally, if you want the business to go through you won't make the price too big, you will not add too big a commission. The sellers are the ones that usually pay the commission. There is no stated commission. There are usually two brokers, one representing the buyer, and the other the seller. There is no agreement between them. Suppose the Union Iron Works was

(Testimony of John McClelland.)

wanting so much money to build a certain boat, then we have to take care of the broker on the other side, and we figure it up. We add that on, and add our own, and telegraph over there that the cost is so much, and if they come back and accept it, we tell the Union Iron Works there is such and such a price, and in making the contract out it is added. The Union Iron Works pays the brokerage; we make an agreement with the owners for a certain price, say $500,000, and that is all the owners know about it. And then the Union Iron Works puts out its contract, and returns to me a certain percentage of the contract price. All the dealings are that way. There is no agreement at all with the purchaser. They don't know any more than the contract price. They know there must be [110—87] brokerage in it. We contracted for one vessel for over a $1,000,000.00, and our commission was around $20,000.00.

**Testimony of Fred L. Doelker, for Defendant.**

FRED L. DOELKER, called for defendant, *and* testified:

I am Traffic Manager of W. R. Grace & Company, and I supervise contract and commissions upon contracts for freight and cargo.

Q. I will ask you to state what would have been a reasonable commission to an agent for procuring a contract entered into with the Dupont de Nemours Powder Company here in San Fracnisco on the 10th of July, 1917, covering the carrying of forty

(Testimony of Fred L. Doelker.)

thousand tons of nitrate, 10 per cent more or less, from the Nitrate Range in Chile to San Francisco and/or Tacoma and/or Powder Point, Washington, within the period of one year commencing June 1, 1917, and ending June 1, 1918?

A. Our customary commission is 5 per cent on the gross freight.

Q. I will ask you to state whether or not that commission would be payable to the man who secured that contract whether or not he continued as the agent of the steamship line throughout the entire period that the contract referred to?

To which question counsel for the plaintiff object upon the ground that it is incompetent and immaterial, and thereupon the Court sustained said objection upon the ground that it is a question of law, to which ruling the counsel for the defendant then duly excepted, and said exception is here designated as

EXCEPTION No. FIFTEEN.

Mr. MOORE.—Q. Would that commission of five per cent be payable for the procuring of that contract irrespective of [111—88] whether or not the agent had anything himself to do with the actual carrying out of the contract?

Mr. FRANK.—The same objection.

The COURT.—I think that is all right. That is a question, of course, which would depend on the trade.

A. What is the question?

Q. Would that commission which you have men-

(Testimony of Fred L. Doelker.)

tioned apply to the agent's compensation whether he had anything to do with the carrying out of the contract after it was made?

A. I would think so; yes; it would apply; if he made the contract, he is entitled to his commission.

Q. It would be worth that, you think, simply for procuring the contract?

A. For procuring the contract, yes.

Cross-examination.

Mr. FRANK.—Q. In your business, you are simply a traffic agent for W. R. Grace & Co.?

A. Yes.

Q. And you procure freight for the vessels of W. R. Grace & Co.? A. Yes.

Q. That go between here and South America; Is that right? A. That is true, yes.

Q. In that capacity, you never make any outside contracts on commission, do you?

A. Not in that particular case, but we do make outside contracts.

Q. But you have never made any outside contracts—it is the same as a broker, is it not, a chartering broker? A. We go outside.

Q. Answer the question. * * *

Mr. FRANK.—Q. Mr. Doelker, a contract of that kind that was stated to you by counsel is simply of the nature of a [112—89] brokerage contract or a chartering, for instance, of the vessel?

A. As I understand it, it is a freighting contract.

Q. The same thing, isn't it?

A. It is a freighting contract.

(Testimony of Fred L. Doelker.)

Q. The same thing, isn't it?

A. I don't know what you mean by "the same thing."

Q. What is the difference between a freighting contract and a contract to charter a vessel to carry the freight?

A. A good deal of difference in chartering a vessel and making a freight contract for a vessel.

Q. As a matter of fact, if there is that difference, in your business, you have not been called upon to make any contracts for freight of vessels outside of the vessels you were operating yourself?

A. We operate on our own vessels, but we have to arrange contracts outside for cargo for which we have to pay a commission.

Q. You pay somebody else a commission?

A. Surely.

Q. That is the idea? A. Yes.

The COURT.—Q. Are you regularly in the employ of W. R. Grace & Co.? A. Yes.

Q. You never make any independent charge yourself for any contract you negotiate?

A. Not that we negotiate; no.

Q. That is covered by your compensation?

A. We are operating a line. If we have to arrange contracts outside for cargo, we have to pay a commission.

Q. To other brokers?

A. To other brokers or ships, as the case may be.

Mr. FRANK.—Q. Did you ever make any annual contracts of that nature?

(Testimony of Fred L. Doelker.)

A. We have made annual contracts, yes. [113—90]

Q. With whom?

A. The American Smelting and Refining Company.

Q. Anybody else?

A. Nobody else since I have been there; there have been before.

Q. This one only? A. Yes.

Q. What commission did you pay for it?

A. We made that contract ourselves.

Q. You did not pay any commission?

A. For our own vessels we do not have to pay any commission.

Q. Then, as a matter of fact, there is no instance at all in which you have paid any commission or known of any commissions that have been paid in your business for getting a freighting contract?

A. There is when we have to go outside, yes, for freight.

Q. But you have not done it?

A. There may have been times when we have gone outside; yes.

Q. I asked you instances, and you mentioned one, and you say you did not pay for that. Now, is there any other?

A. That is an annual contract. We have had vessels at different times that did not have any cargo, and we had to pay a commission to get it.

Q. That is, a particular cargo for a particular vessel? A. Yes.

(Testimony of Fred L. Doelker.)

Q. What vessels, for instance?

A. I don't recall offhand.

Q. You don't recall any; don't you recall any of them at all? A. No.

Q. You do not recall any person to whom you paid such a commission, either, do you?

A. Yes. [114—91]

Q. To whom?

A. We have paid it to our West Coast house.

Q. To your own house, that is, down in South America? A. Down on the west coast.

Q. Not up here in San Francisco at all?

A. Not that I can recall.

**Testimony of Fred W. Wallace, for Defendant.**

FRED W. WALLACE, called as a witness for the defendant, *and* testified:

I am purchasing agent at San Francisco for the Dupont Powder Company. I have prepared a statement showing the dates and tonnage carried under, or during the year from July 1, 1917, to July 1, 1918, of nitrate, between the Nitrate Range of Chile and San Francisco, and Powder Point and Tacoma, Washington. The amount carried was 36,301.*00*, tons, but the amount carried thereunder prior to October 1, 1917, was 3,546 tons. The amount really carried under this contract subsequent to October 1st, concerning which there is a dispute, is 32,755.

**Testimony of C. Henry Smith, for Defendant (Recalled).**

C. HENRY SMITH, recalled as a witness for the defendant, testified:

Q. I will ask you to state whether or not Mr. Lindvig at any time claimed that you were not entitled to your commission on the "Regulus" until the time that he filed this suit.

To said question counsel for the plaintiff objected as immaterial, and also because it is asking for a conclusion and the Court thereupon sustained said objection, to which ruling counsel for the defendant duly excepted, and said exception is here designated as

EXCEPTION No. 17. [115—92]

Q. I will ask you to state whether or not Mr. Lindvig at any time, either said to you verbally or in writing, that you were not entitled to your commission on the "Regulus" prior to the first day of December, when a question was raised in regard to that matter in a letter written by Mr. Frank, which is carried into the bill of particulars?

To said question counsel for the plaintiff objected as incompetent and immaterial, and the Court thereupon sustained said objection, to which ruling counsel for the defendant duly excepted, and said exception is here designated as

EXCEPTION No. 18.

**Testimony of John A. Bishop, for Defendant (Recalled.)**

JOHN A. BISHOP, recalled as a witness for the defendant, testified:

Q. I will ask you to state whether or not you know what the custom is without referring now to any particular contract, what the custom is, if you know, in regard to allowing reimbursement for services by the agent in connection with the salvaging of vessels, where he has a general contract wherein the compensation specified is a percentage of the freight earned?

To said question counsel for the plaintiff objected as follows:

"Mr. FRANK.—I object to the gentleman's competency to testify upon the question of custom, and in the second place I object to the question substantively on the ground that the evidence as to custom that is offered cannot be introduced as tending to vary the terms of the contract before us; this is not a question between the cargo owners and the freight owners, and the ship owners, but is purely and only a question between the ship owner and his agent, on a private contract. * * * I object to the question as before, both as to the competency of the witness, and to the competency of the testimony, even if this man were competent t otestify. This is not a question of compensation between principal and agent, but it is compensation entirely between different interests, and under entirely different circum-

(Testimony of John A. Bishop.)

stances. It has nothing to do with this question."

The Court thereupon sustained said objection, to which ruling counsel for the defendant duly excepted, and said exception [116—93] is here designated as

EXCEPTION No. 19.

Q. I will ask you to state whether or not the custom, if any, is uniform, and has been for the last 20 years in this port, whereby general agents are allowed reimbursement for the services rendered by them in connection with the salvage of vessels, where their agency contract merely specified as their remuneration a certain percentage upon the freight earned?

To said question counsel for the plaintiff objected as follows:

"Mr. FRANK.—I object to the gentleman's competency to testify upon the question of custom, and in the second place I object to the question substantively on the ground that the evidence as to custom that is offered cannot be introduced as tending to vary the terms of the contract before us; this is not a question between the cargo owners and the freight owners, and the ship owners, but is purely and only a question between the ship owner and his agent, on a private contract. * * * I object to the question as before, both as to the competency of the witness, and to the competency of the testimony, even if this man were competent to testify. This is not a question, of compensation between principal and agent, but

(Testimony of John A. Bishop.)

it is compensation entirely between different interests, and under entirely different circumstances. It has nothing to do with this question."

The Court thereupon sustained said objection, to which ruling counsel for the defendant duly excepted, and said exception is here designated as

EXCEPTION No. 20. [117—94]

The defendant further testified as follows:

I entered into this contract of agency with Mr. Lindvig in 1914. Began operations in the end of 1914. We got the first ship in Europe in 1914, the "Baja California," the *the* "Sinaloa" came along; operated on this coast with these two boats. The business increased with the demand for cargo space, and to meet that increased business the "Governor Forbes" was bought and put on the run.

Then the "Regulus" was bought for the same purpose, and put upon the run. She was built for that purpose, and put upon that run.

The "Romulus" was being built for the same purpose, and intended for the same business.

I made no charge for the commission on the "Governor Forbes" until October 21, 1917.

Mr. MOORE.—Q. Mr. Smith, how did it happen that your commission on the "Governor Forbes" did not appear in your accounts to Mr. Lindvig prior to October 1, 1917?

A. Well, because I was in Europe in the end of 1916 and came back in the beginning of 1917, and I was so busy with everything that I had no time

(Testimony of John A. Bishop.)

to look through the accounts until I got back and put the accountants on the whole account, and I discovered it was not charged.

I rendered many accounts to Mr. Lindvig during the period from January up to October 21, 1917. In none of these accounts does this charge anywhere appear, except that one of October 21, 1917.

The witness is here shown Plaintiff's Exhibit 1, and asked what it purports to be:

A. That is a supplementary statement to cancel general account July 14, 1917. That is dated July 16, 1917. It has nothing at all in it about the "Governor Forbes," nor [118—95 to 97] anything in it about compensation for the "Regulus," and nothing in it about compensation for Hull 154.

The account is offered in evidence, marked Plaintiff's Exhibit 1, and is as follows: [119—98]

**Plaintiff's Exhibit No. 1.**

Mr. A. O. Lindvig,

In account with C. HENRY SMITH.

Supplementary a/c to Cancel Gen. a/c July 14/17.

DEBIT.

| | | |
|---|---|---|
| Deposited First National Bank (last Bal) | | $ 24,138.36 |
| May 9. | Western Union Telegraph Co., Service | 55.66 |
| 10. | Postal Telegraph Co., Service | 12.22 |
| 28. | Commercial News Pub. Co., Adv. | 20.00 |

| | | |
|---|---|---|
| 15. | O'Connel & Davis, Printing | 112.00 |
| June 20. | Guide Publishing Co., Adv.. | 40.00 |
| 20. | Postal Telegraph Co., Service ..... | 5.17 |
| 20. | Western Union Telegraph Co., Service ..... | 82.65 |
| July 9. | Union Iron Works, A/C Hull #154 ..... | 77,500.00 |
| | | $101,966.06 |

CREDIT.

| | |
|---|---|
| Balance Transferred from Baja Calif. V. 11 ..... | $ 41,523.86 |
| Balance Transferred from Gov. Forbes V. 2 ..... | 9,957.37 |
| Advanced a/c Mrs. Petra Smith..... | 300.00 |
| 2½% on $77,500.00 as per contract on on Hull #154 ..... | 1,937.50 |
| Balance due C. Henry Smith..... | 48,247.33 |
| | $101,966.06 |

San Francisco, July 16, 1917.

Canceled

(Pencil notation.) [120—99]

The witness is then shown another account, and asked what it purports to be:

A. That is a supplementary statement to cancel the account of July 16th, and is dated September 11th, 1917, and is a substitute for both the account of July 14th and July 16th. That has noth-

ing in it about compensation for the "Governor Forbes," or compensation for the "Regulus" or compensation for Hull 154.

The account is offered in evidence, marked exhibit 2 and is as follows: [121—100]

**Plaintiff's Exhibit No. 2.**

A. O. Lindvig,

In Account with C. HENRY SMITH.

Supplementary a/c to Cancel General a/c July 16, 1917.

DR.

| | | | |
|---|---|---|---|
| May | 9. | Western Union Telegraph Co., Service ..... | 55.66 |
| | 10. | Postal Telegraph Co..... | 12.22 |
| | 28. | Commercial News Publishing Co. (Advt.) ..... | 20.00 |
| | 15. | O'Connel & Davis (Printing).. | 112.00 |
| June | 20. | Guide Publishing Co. (Advt.) | 40.00 |
| | 20. | Postal Telegraph Co. (Service) ..... | 5.17 |
| | 20. | Western Union Telegraph Co., (Service) ..... | 82.65 |
| July | 9. | Union Iron Works Co. (a/c Hull #154).....77,500.00 | |
| | | | 77,827.70 |

CR.

| | |
|---|---|
| Balance Transferred from "Baja Calif." V–11 .....41,523.86 | |
| Balance Transferred from "Gov. Forbes" V–2 ..... | 9,957.37 |

| | |
|---|---|
| Advanced a/c Mrs. Petra Smith..... | 300.00 |
| 2½% on $77,500.00 as per contract Hull 154 ..... ..... | 1,937.50 |
| Balance due C. Henry Smith..... | 24,108.97 |
| | 77,827.70 |

San Francisco, Calif., September 11, 1917. [122—101]

At the time of this transaction I knew the date that my contract was to expire. I don't recall the date exactly when the arrangement was made to extend my agency to October 1st, but it was about the same time I presume. About August 1st is the first time I heard of the turning over of the agency. Nothing was said before that. On August first I know that the business was going to leave me. The two months after that were to enable me to straighten out my affairs and my business.

The witness is then shown another account, Plaintiff's Exhibit 3, and asked what it is, and testifies:

That is a corrected statement—a final statement—supplemental statement, dated October 15, 1917. That is the next statement after those two that are already in evidence, that I made to Mr. Lindvig. It is the first statement in which appears a charge for attending to payments, etc., Hull 154, etc. And also the first statement of commissions on Dupont Powder Company, etc., $25,517.00.

(Testimony of John A. Bishop.)

There is nothing in here about the "Governor Forbes." This is October 15, 1917.

Q. Now, I call your attention, Mr. Smith, to the order of dates on the debit side of this account, July, August, September, October, then begins June 1st, and under date of June 1st, are those two charges to which I have just called your attention?

A. Yes.

Q. Why was that?

A. Well, because Hull 154 was just about turned over, and we were winding up the affairs at that time, and the "Governor Forbes" charge was omitted. It was an oversight, because I was away and I was busy.

This is an absolutely correct statement.

The account was introduced in evidence, marked Plaintiff's Exhibit No. 3, and is as follows: [123—102]

**Plaintiff's Exhibit No. 3.**

A. O. Lindvig,

In a/c C. Henry Smith.

DEBITS.

| | | | |
|---|---|---|---|
| July | 20. | Balance due C. Henry Smith per corrected statement 9/11/17 ..... | 24,108.97 |
| | 12. | O'Connell & Davis—Staty..... | 131.25 |
| | 17. | Bank of Italy Int. on Loan to pay Union Iron Works.... | 87.50 |
| | 23. | Western Union Teleg. Co., Telegrams ..... | 5.23 |
| | 23. | Consul of Norway..... | 17.86 |

| | | | |
|---|---|---|---|
| Aug. | 8. | Union Iron Wks. a/c Hull 154 ..... | 77,500.00 |
| | 16. | Com'l News Pub. Co., Advertising ..... | 20.00 |
| | 16. | Consulate of Norway, Telegrams ..... | 10.81 |
| | 16. | Union Iron Wks. a/c. Hull 154 ..... | 77,500.00 |
| | 16. | Bank of Italy Int. on Loan to pay U. I. Wks..... | 88.30 |
| | 16. | Postal Telegraph Co., Telegrams ..... | 29.67 |
| | 21. | C. H. Smith, Deposit by Harold S. With Letter 7/9/17. | 173.00 |
| | 22. | Com'l News Pub. Co., Advertising ..... | 20.00 |
| | 24. | Deposit First Natl. Bk. Cash on a/c Baja-California & Governor Forbes ..... | 75,000.00 |
| | 25. | Guide Publishing Co., Advertising ..... | 40.00 |
| | 30. | B. Lindvig, Cash..... | 10,000.00 |
| | 30. | Town Taxi Co. (July) a/c New Bldg. ..... | 4.60 |
| | 31. | Western Union Teleg. Co., Co., Telegrams ..... | 31.17 |
| Sept. | 4. | B. Lindvig, Cash ..... | 100.00 |
| | 4. | Tait's Cafe ..... | 26.15 |
| | 4. | C. D. Bunker & Co., Custom Fee Pre-entry Bond ..... | .40 |
| | 7. | Western Union Teleg. Code Co., Books ..... | 11.00 |

| | | | |
|---|---|---|---|
| | 6. | Legation of Norway, Wash., Telegrams ..... | 24.70 |
| | 13. | Consulate of Norway..... | 94.00 |
| | 14. | Postal Telegraph Co., Telegrams ..... | 11.28 |
| | 25. | Western Union Teleg. Co., Telegrams ..... | 27.58 |
| | 25. | Deposit First Natl. Bk. Bal. due a/c Baja-California & Gov. Forbes ..... | 27,717.74 |
| | 29. | Disbts. 1915/16 a/c Baja-California not reported ..... | 386.75 |
| | 29. | Disbts. 1916 a/c Sinaloa, not reported ..... | 20.65 |
| Oct. | 4. | Town Taxi Co. Aug. & Sept. a/c New Bldg..... | 3.60 |
| | 10. | Pacific Telephone & Tel. Co. (Switching) ..... | .40 |
| June | 1. | Andros & Hengstler, Legal Serv. Gov. Forbes..... | 187.50 |
| | | Office Remuneration. | |
| | | Sinaloa Salvage a/c ..... | 66,470.81 |
| | | Office Remuneration for handling contract Union Iron Works. a/c Hull 154, attending to payments, etc... | 10,000.00 |
| | | Baja-California V. 12 Supplementary a/c ..... | 3,302.14 |
| | | Regulus V. 3 Supplementary a/c ..... ..... | 5,039.63 |
| | | Commission on Dupont Powder contract 40000 tons | |

(Testimony of John A. Bishop.)

less Baja-California V. 12 shipped 2507 tons Regulus V. 3—1039 tons total 3546 tons. Balance to ship 36454 tons @ 14.00 average $510356.00 @ 5% ..... 25,517.80

Balance due A. O. Lindvig.... 31,853.90

435,564.39

[124—103]

A. O. Lindvig

In A/C C. Henry Smith.

CREDITS.

| | | | | | |
|---|---|---|---|---|---|
| July 17. | Remittance a/c Union Iron Works, Hull 154..... | | | | 75,000.00 |
| Aug. 16. | Remittance a/c Union Iron Works, Hull 154..... | | | | 75,000.00 |
| Sept. 29. | Baja-California Voy. | 12 | Balance..... | | 57,895.61 |
| 29. | Governor Forbes " | 3 | " ..... | | 44,822.13 |
| 29. | Regulus " | 2 | " ..... | | 146,565.58 |
| Oct. 11. | Governor Forbes " | 3 | " Supple. a/c..... | | 123.10 |
| 12. | Sinaloa " | 9 | " ..... | | 32,282.97 |
| | 2 1/2% on 155000.00 per contract Hull 154..... | | | | 3,875.00 |

435,564.39

Oct. 15/17. [125—104]

Q. If it is absolutely correct why then did you give him another account of which this is a copy?

A. I mean this one is correct.

Q. Then the other one was not correct? This is a corrected statement, A. O. Lindvig in account C. Henry Smith, Supplemental Statement, dated October 15, 1917: Is that right?

A. Yes. That was delivered about the same time. I have not got the date in my head.

(Testimony of John A. Bishop.)

Q. Now, Mr. Smith, wasn't that delivered about the 21st day of November, 1917, the corrected statement, and was it not the one that was referred to in the letter of November 24, 1917?

A. I can't recall the date. The expert accountant can give you that.

Q. Now, I call your attention, Mr. Smith, that in that account which you say is correct, there is no mention of the "Governor Forbes," is there?

A. No, not on that one; the other one there is.

Q. None of these that I have handed you up to this time? A. No.

Q. This you have called the final statement supplementing statement dated October 15th, 1917, and which you say is correct? A. Yes.

The document is marked Plaintiff's Exhibit No. 4, and is as follows: [126—105]

**Plaintiff's Exhibit No. 4.**

CORRECTED STATEMENT,
A. O. LINDVIG,
IN A/C
C. HENRY SMITH.

FINAL STATEMENT—Supplementing statement dated October 15, 1917.

DEBITS.

| | | |
|---|---|---|
| July 20. | Balance due C. Henry Smith per corrected Statement 9/11/17 ..... | 24108.97 |
| " 12. | O'Connell & Davis, Staty. ..... | 131.25 |
| " 23. | Western Union Teleg. Co., Telegrams..... | 5.23 |
| " 23. | Consul of Norway "..... | 17.86 |
| " 8. | Union Iron Works a/c Hull 154..... | 77500.00 |
| Aug. 16. | Com'l News Pub. Co., Advertising..... | 20.00 |
| " 16. | Consulate of Norway, Telegrams..... | 10.81 |
| " 16. | Postal Telegraph Co., "..... | 29.67 |
| " 21. | C. H. Smith. Deposit by Harold S. With Letter 7/9/17 ..... | 173.00 |

| | | |
|---|---|---|
| Aug. 22. | Com'l News Pub. Co., Advertising..... | 20.00 |
| " 24. | Deposit First Natl. Bk., Cash on a/c Baja-California & Gov. Forbes .....75000.00 | |
| " 25. | Guide Publishing Co., Advertising..... | 40.00 |
| " 30. | B. Lindvig, Cash .....10000.00 | |
| " 30. | Town Taxi Co. (July), a/c New Bldg. .... | 4.60 |
| " 31. | Western Union Tel. Co., Telegrams..... | 31.17 |
| Sept. 4. | B. Lindvig, Cash..... | 100.00 |
| " 4. | Tait's Café ..... | 26.15 |
| " 4. | C. D. Bunker & Co., Custom fee pre-entry bond ..... | .40 |
| " 7. | Western Union Tel. Code Co., Books..... | 11.00 |
| " 6. | Legation of Norway, Wash., Telegrams.... | 24.70 |
| " 13. | Consulate of Norway ..... | 94.00 |
| " 14. | Postal Telegraph Company, Telegrams..... | 11.28 |
| " 25. | Western Union Teleg. Co., Telegrams..... | 27.58 |
| " 25. | Deposit First. Natl. Bk., Bal. due a/c Baja-California & Gov. Forbes.....27717.74 | |
| " 29. | Disbts. 1915/16 a/c Baja-California not reported ..... | 386.75 |
| " 29. | Disbts. 1916 a/c Sinaloa, not reported..... | 20.65 |
| Oct. 4. | Town Taxi Co., Aug. & Sept. a/c New Bldg. | 3.60 |
| " 10. | Pacific Telephone and Tel. Co. (Switching) | .40 |
| " 16. | Andros & Hengstler, Legal Serv. Gov. Forbes | 187.50 |
| " 17. | Barkentine Alta a/c Insurance credited twice as per letter A. O. Lindvig, Aug. 27/17 ..... | 1807.50 |
| " 29. | Commercial News Pub. Co., Advt. June/17. | 20.00 |
| " 31. | Purser's Cash on hand after each voyage and taken up in account by same a/c | |
| | Gov. Forbes Voyage #3..... | 55.38 |
| | Gov. Forbes Voyage #4..... | 173.14 |
| " 31. | Balance due a/c closing Baja-V. 12..... | 1.01 |
| " 17. | Deposit First National Bank on a/c balance due Oct. 15th .....25000.00 | |
| Oct. 8. | Office Remuneration for procuring and handling contract Union Iron Wks., a/c Hull 154, attending to payments, etc. ....10000.00 | |
| | Sinaloa Salvage Account .....66470.81 | |
| | Baja-California V. 12 Supplementary a/c.... | 3302.14 |
| | Regulus V. 3 ..... | 5039.63 |

Oct. 12. Commission on Dupont Powder contract, procuring same, 40000 tons less Baja-California Voyage #12, shipped 2507 tons, [127—106]

A. O. LINDVIG,
IN A/C
C. HENRY SMITH,
DEBITS. 403710.49

| | | |
|---|---|---|
| July 20. | Balance due C. Henry Smith, per Corrected statement 9/11/17 | 24108.97 |
| July 12. | O'Connell & Davis, Staty. | 131.25 |
| " 17. | Bank of Italy Int. on Loan to pay Union Iron Works | 87.50 |
| " 23. | Western Union Teleg. Co., Telegrams | 5.23 |
| " 23. | Consul of Norway, Telegrams | 17.86 |
| " 8. | Union Iron Works a/c Hull 154 | 77500.00 |
| Aug. 16. | Com'l. News Pub. Co., Advertising | 20.00 |
| " 16. | Consulate of Norway, Telegrams | 10.81 |
| " 16. | Union Iron Wks., a/c Hull 154 | 77500.00 |
| " 16. | Bank of Italy—Int. on Loan to pay U. I. Wks. | 88.30 |
| " 16. | Postal Telegraph Co., Telegrams | 29.67 |
| " 21. | C. H. Smith, Deposit by Harold S. With Letter 7/9/17 | 173.00 |
| " 22. | Com'l. News Pub. Co., Advertising | 20.00 |
| " 24. | Deposit First Natl. Bk. Cash on a/c Baja-California & Governor Forbes | 75000.00 |
| " 25. | Guide Pub. Co., Advertising | 40.00 |
| " 30. | B. Lindvig, Cash | 10000.00 |
| " 30. | Town Taxi Co. (July), a/c New Bldg. | 4.60 |
| " 31. | Western Union Teleg. Co., Telegrams | 31.17 |
| Sept. 4. | B. Lindvig, Cash | 100.00 |
| " 4. | Tait's Café | 26.15 |
| " 4. | C. D. Bunker & Co., Custom Fee Pre-entry Bond | .40 |
| " 7. | Western Union Teleg. Code Co., Books | 11.00 |
| " 6. | Legation of Norway, Wash., Telegrams | 24.70 |
| " 13. | Consulate of Norway | 94.00 |
| " 14. | Postal Telegraph Co., Telegrams | 11.28 |
| " 25. | Western Union Teleg. Co., Telegrams | 27.58 |
| " 25. | Deposit First Natl. Bk. Bal. due a/c Baja-California & Gov. Forbes | 27717.74 |

(Testimony of John A. Bishop.)

| | | | |
|---|---|---|---|
| Sept. 29. | Disbts. 1915/16 a/c Baja-California not reported | 386.75 | |
| " 29. | Disbrs. 1916 a/c Sinaloa, not reported | 20.65 | |
| Oct. 4. | Town Taxi Co., Aug. & Sept. a/c New Bldg. | 3.60 | |
| " 10. | Pacific Telephone & Tel. Co. (Switching) | .40 | |
| June 1. | Andros & Hengstler, Legal Serv. Gov. Forbes | 187.50 | |
| | Office Remuneration: | | |
| | Sinaloa Salvage A/C | 66470.81 | |
| | Remuneration a/c Hull 154 Contract Union Iron Works | 10000.00 | |
| | Baja-California V. 12 Supplementary a/c | 3302.14 | |
| | Regulus V. 3 Supplementary a/c | 5039.63 | |
| | Commission on Dupont Powder contract 40000 tons less Baja-California V. 12 shipped 2507 tons Regulus V. 3—1039 tons—Total 3546 tons. Balance to ship 36454 tons @ 14.00 average 510356.00 @ 5% | 25517.80 | |
| | Balance due A. O. Lindvig | | 31853.90 |
| | | | 435564.39 |

[128—107]

A. O. LINDVIG,
IN A/C
C. HENRY SMITH,
CREDITS.

| | | | |
|---|---|---|---|
| July 17. | Remittance a/c Union Iron Works, Hull 154 | | 75000.00 |
| Aug. 16. | Remittance a/c Union Iron Works, Hull 154 | | 75000.00 |
| Sept. 29. | Baja-California Voy. 12 Balance | | 57895.61 |
| " 29. | Governor Forbes " 3 " | | 44822.13 |
| Sept. 29. | Regulus " 2 " | | 146565.58 |
| Oct. 11. | Governor Forbes " 3 " Supple. a/c | | 123.10 |
| " 12. | Sinaloa " 9 " | | 32282.97 |
| | 2 1/2% on 155000.00 per contract Hull 154 | | 3875.00 |
| | | | 435564.39 |

[129—108]

(Testimony of John A. Bishop.)

The witness is then shown another account, and asked what that purports to be:

A. That is a substituted statement for the statement dated October 15, 1917.

Mr. FRANK.—I call your attention to the last item there, November 8th on that; it was after November 8th?

A. Yes.

Q. That is the last account you sent to Mr. Lindvig, is it not? The other was supposed to be a final statement, and this is a substitute for it?

A. Yes, that is the 1st. That is the first time I ever made mentioned of the "Governor Forbes" commission in this account. The entry is under date of October 31, "Commission on purchase of the 'Governor Forbes' $340,000 at 2 per cent, omitted former statement by mistake, as per offer August 18, 1916."

The document is offered in evidence, marked Plaintiff's Exhibit No. 5, and is as follows: [130—109].

**Plaintiff's Exhibit No. 5.**

CORRECTED STATEMENT.

A. O. LINDVIG,

IN A/C

C. HENRY SMITH,

Substituted for Statement Dated October 15, 1917.

DEBITS.

| | | |
|---|---|---|
| July 20. | Balance due C. Henry Smith per statement July 20 as corrected 9/11/17..... | 24,108.97 |
| 12. | O'Connell & Davis, Staty. ..... | 131.25 |
| 23. | Western Union Telegraph Co., Telegrams..... | 5.23 |
| 23. | Consul of Norway ..... | 17.86 |
| 8. | Union Iron Works a/c Hull 154..... | 77,500.00 |

| | | |
|---|---|---|
| Aug. 16. | Com'l News Pub. Co., Advertising..... | 20.00 |
| 16. | Consulate of Norway, Telegrams..... | 10.81 |
| 16. | Postal Telegraph Co., Telegrams..... | 29.67 |
| 21. | C. H. Smith, Deposit by Harold S., With Letter 7/9/17 ..... | 173.00 |
| 22. | Com'l News Pub. Co., Advertising..... | 20.00 |
| 24. | Deposit First Natl. Bl. Cash on a/c Baja-California & Gov. Forbes ..... | 75,000.00 |
| 25. | Guide Publishing Co., Advertising ..... | 40.00 |
| 30. | B. Lindvig, Cash ..... | 10,000.00 |
| 30. | Town Taxi Co. (July), a/c New Bldg. ..... | 4.60 |
| 31. | Western Union Tel. Co., Telegrams..... | 31.17 |
| Sept. 4. | B. Lindvig, Cash ..... | 100.00 |
| 4. | Tait's Café ..... | 26.15 |
| 4. | C. D. Bunker & Co., Custom fee pre-entry bond.... | .40 |
| 7. | Western Union Tel. Code Co., Books..... | 11.00 |
| 6. | Legation of Norway, Wash., Telegrams..... | 24.70 |
| 13. | Consulate of Norway,..... | 94.00 |
| 14. | Postal Telegraph Co., Telegrams ..... | 11.28 |
| 25. | Western Union Teleg. Co., Telegrams..... | 27.58 |
| 25. | Deposit First Natl. Bk. Balance due a/c Baja-California & Gov. Forbes ..... | 27,717.74 |
| 29. | Disbts. 1915/16 a/c Baja-California not reported.. | 386.75 |
| 29. | Disbts. 1916 a/c Sinaloa, not reported..... | 20.65 |
| Oct. 4. | Town Taxi Co., Aug. & Sept. a/c New Bldg. ..... | 3.60 |
| 10. | Pacific Telephone & Tel. Co. (Switching)..... | .40 |
| 16. | Andros & Hengstler, Legal Serv. Gov. Forbes.... | 187.50 |
| 17. | Barkentine Alta a/c Insurance credited twice as per letter A. O. Lindvig, Aug. 27/17..... | 1,807.50 |
| 29. | Commercial News Pub. Co., Advt. June/17..... | 20.00 |
| 31. | Purser's Cash on hand after each voyage and taken up in account by same a/c Gov. Forbes Voyage #3 | 55.38 |
| | Gov. Forbes Voyage #4 ..... | 173.14 |
| 31. | Balance due a/c closing Baja-V. 12..... | 1.01 |
| 17. | Deposit First National Bank on a/c balance due Oct. 15th ..... | 25,000.00 |
| 8. | Office Remuneration for procuring and handling contract Union Iron Wks. a/c Hull 154, attending to payments, etc. ..... | 10,000.00 |
| | Sinaloa Salvage Account ..... | 66,470.81 |
| | Baja-California V. 12 Supplementary a/c..... | 3,302.14 |
| | Regulus V. 3 ..... | 5,039.63 |

| | | |
|---|---|---|
| 12. | Commission on Dupont Powder contract 40000 tons less Baja-California V. 12 shipped 2507 tons Regulus [131—110]<br>V. 3—1039 tons—Total 3546 tons. Balance to ship 36454 tons @ 14.00 average $510356.00 @ 5%—(See letter attached) | 25,517.80 |
| Oct. 31. | Commission on Inward Freight Gov. Forbes V. 3 $40993.00—5% | 2,049.65 |
| 31. | Commission on Coastwise Freight Baja-California V. 12 as per statement Duncan, Fox & Company, Oct. 10/17—£789-19-2 @ 4.75½, #3756.45 3½%.. | 131.47 |
| Nov. 5. | E. I. Du Pont de Nemours Co., amount due a/c over-payment freight Nitrate Ex. Sinaloa Voyage #8.. | 3,119.12 |
| Oct. 31 | Disbursements B. Lindvig, on a/c as per statement rendered | 5,485.84 |
| 31. | Amount due Milne, Williamson Co., Guayaquill, Ecudor for freight and disbursements S. S. Governor Forbes per letter October 20th | 2,799.98 |
| 31. | Commission on Purchase Gov. Forbes $340,000.00 @ 2%—omitted former statements by mistake—as per offer August 18th, 1916 | 6,800.00 |
| 31. | Deposit First National Bank on a/c | 56,443.86 |
| | Amount held in suspense during computation of bookings | 5,000.00 |
| | | 434,921.64 |

[132—111]

A. O. LINDVIG,
IN A/C
C. HENRY SMITH,
CREDITS.

| | | |
|---|---|---|
| July 17. | Remittance a/c Union Iron Works Hull 154 | 75,000.00 |
| Aug. 16. | Remittance a/c Union Iron Works Hull 154 | 75,000.00 |
| Sept. 29. | Baja-California V. 12—Balance | 57,895.61 |
| 29. | Governor Forbes V. 3—Balance | 44,822.13 |
| 29. | Regulus V. 2—Balance | 146,565.58 |
| Oct. 11. | Governor Forbes V. 3—Balance Supple. a/c | 123.10 |
| 12. | Sinaloa V. 9—Balance | 32,282.97 |
| 17. | Barkentine Alta a/c, Insurance paid per letter A. O. Lindvig, Aug. 27/17 | 265.50 |
| 17. | Barkentine Alta a/c, Telegrams paid per letter A. O. Lindvig, Aug. 27/17 | 70.00 |
| 31. | Charged in error Sinaloa V. 9 a/c Gen'l. Petroleum Co. San Pedro Barging | 35.00 |

(Testimony of John A. Bishop.)

| | | |
|---|---|---|
| 31. | Sinaloa V. 9. Error check Getz Bros 245.59—245.49 | .10 |
| 31. | Gov. Forbes V. 2 Union Oil Co. Credit not reported | 555.00 |
| Nov. 8. | Amount overcharged on statement Sinaloa Salvage a/c Geo. W. Price Pump & Engine Company | 200.00 |
| | Commission on same—5% | 10.00 |
| | 2 1/2% on $77500.00 per contract Hull 154 | 1,937.50 |
| | Consular fees charged in error—Regulus V. 2, Supplementary a/c—W. C. Dawson, Seattle | 62.40 |
| | Chilian Consulate | 96.75 |
| | | 434,921.64 |

[133—111]

On direct examination I suggested in regard to services in getting the "Governor Forbes" that I had considerable trouble in getting the flag, and having a trial in the Supreme Court to have the title passed, and things of that sort. I engaged attorneys to attend to it, for the purpose of appealing to the Supreme Court.

Q. Now I call your attention to this contract, Mr. Smith:

> "The Seller, on or before October 10, 1916, is to secure the consent necessary from any and all public authorities to transfer and convey the entire interest of every kind and nature in said steamer to Purchaser absolutely. Said consent or a certified copy of an order or letter giving said consent, shall be deposited with the Hongkong & Shanghai Banking Corporation at Manila, P. I., immediately after said consent is given. Notification that said consent has been secured and delivered shall be given at the same

(Testimony of John A. Bishop.)

time by cable message to said C. Henry Smith, Incorporated, at San Francisco, etc."

Now, did the seller do that?

A. He did that with my assistance. You might say that I volunteered in the matter; that is what I meant when I said I had trouble about getting it in Manila in the Supreme Court. I knew when these bookings that are in dispute for subsequent to October 1st were being made that they were being made in my office in the manner in which they were made.

Q. You have no complaint with respect to that at all.

A. I have only a complaint that they were taken away. That is all I am complaining about. I understood that if the vessels were to go over into the new control on October 1st, it was necessary in order that they should continue the business, that they should go in that way.

Referring to Mr. Wallace's reports on the Nitrate shipment, they show two shipments in August, one on the "Baja California" and the other on the "Regulus," made while in my office. I got the commissions on those two shipments.

There is a difference between Mr. Wallace's report with regard to the second shipment and the figures in my office, Mr. Wallace's report is 957.94, and my office 1039.05. [134—112]

Q. In the letter received by you from Mr. Lindvig, dated August 29, 1917, the following occurs:

"As formerly told you there was no voucher regarding your remuneration account building

(Testimony of John A. Bishop.)

steamship 'Regulus,' $6,000." That refers, does it not, to a letter written to you by Mr. Lindvig dated July 18, 1917?

A. Yes, that is very possible.

The matter referred to in the letter of July 18, 1917, reads as follows:

"*Your statement of 1st June.* As far as I can see hitherto, there is no voucher concerning the item 'Remuneration a/c Regulus $6000.' Please explain same." (Plffs. Ex. 10.)

I replied to Mr. Lindvig's letter of August 29, 1917, as follows:

"*Statement of June 1st.* Regarding this voucher, we have sent you one, as far as I remember, and it is for attending to contract, making payments and keeping books for this vessel and also for protecting the contract."

The business of Mr. Silva in my office had to do with attending to the business of these particular steamers. I had no other steamers at that time.

Under this agency agreement I had quite a large number of duties to perform and did perform during the agency; I made contracts for freightage, saw that the freightage was procured and delivered alongside, and that it was stevedored and put on board, and that it was transported to its place of destination, and then discharged in a proper manner, and delivered to the consignees.

Q. You also, in the course of your agency, attended to the making of all contracts respecting the supplies,

(Testimony of John A. Bishop.)

the oil, and the general equipment of all the vessels, did you not?

A. I made contracts for oil, but that was outside of the agency agreed on. I did not buy any supplies for the vessels. I paid the bills. I saw that arrangements for repairs are made. Whatever men were employed to do it, were doing it for me. Among these repairs was repairs to the "Sinaloa" amounting to $135,000. I treated that in the same manner as part of my contract. I collected the freights. Under my [135—113] agency that was part of my business, and to account for them and pay all the bills. After I collected the freights, I got in the bills and paid them, that was part of the business that was done after the ship had delivered her cargo.

I am making a claim in the "Sinaloa" salvage matter that I advanced my own moneys. During June and July 1917.

When I collected these freights from these several vessels on their several voyages, I deposited them in my own name, and made all the payments in my own name. I had a single account for my private moneys and for these moneys that were collected, one single deposit, unsegregated. Outside of the contracts of the "Governor Forbes" and Hull 154, all the rest of the business was done in my own name. The bills of lading ran in my own name. The signature was by the agent of said steamer, C. & C. Inc., for C. Henry Smith, Inc.

They are the agents for C. Henry Smith, Incorporated.

(Testimony of John A. Bishop.)

It was run entirely in my own name. We changed the bills of lading later, at Mr. Lindvig's suggestion. I changed them to read "South America Pacific Line, C. Henry Smith, Inc., Agents." That was in April, 1917. That was the way I conducted all of the business, so far as the operating is concerned. I first took these moneys and mixed them with my own moneys in my own account, and afterwards when I sent a statement and wanted to send any money to Mr. Lindvig, that particular money was taken out and put into the First National Bank and by that Bank transferred to Norway. All of the money went into my private account when it came in.

Three copies of bills of lading were then offered in evidence, and marked Plaintiff's Exhibit 16, and are as follows: [136—114]

**Plaintiff's Exhibit No. 16.**

(1st Bill of Lading:)

(In large caps) "C. HENRY SMITH, INC.
311 California Street,
San Francisco,
U. S. A.

(2nd Bill of Lading:)

(In large caps) "C. HENRY SMITH, INC.
311 California Street,
San Francisco, U. S. A.
LOCAL BILL OF LADING.

RECEIVED from Mohns Commercial Company shipment from Seattle by Steamer "Sinaloa" of C. HENRY SMITH, INC., or any other of said Com-

pany's Steamers, or steamers employed by it, the following Merchandise

2. The said packages are to be forwarded with such reasonable dispatch as the general business of the Carriers will permit, by Steamer or Steamers of C. HENRY SMITH, INC., upon and under the same agreement and subject to all of the said Stipulations and Conditions hereon, and ON THE REVERSE SIDE hereof, to the port of destination or so near thereto as safe navigation of such vessel or vessels shall then permit (but with option to the Master of the vessel or vessels to sail without pilots, tow and assist vessels, deviate, and to lighter, surf, tranship, land and reship said packages or any thereof, and to stop and to land and receive passengers and freight at other ports or places on or off the usual route and in any other), and there, at vessel's tackles, and in like condition to be delivered unto the consignee or his or their assigns or representatives, or if he or they be not on hand to so receive the same, or if said packages be destined beyond said port or place then to any lighterman or wharfinger or to any forwarder or other Carrier for and instead of the said named person, company, assigns, corporation or representatives; and freight at tariff rates (unless otherwise agreed) and all charges advanced by Carriers and average shall be paid in full in ——— on any such delivery, and full freight charges to be so paid on all damaged or unsound packages; and to secure payment of all such charges said packages are hereby pledged to Carrier.

16. C. Henry Smith, Inc., reserves the right, in the event of any trouble arising between the Company and any of the Central American Republics, to store the cargo at the risk and expense of owner, shipper and/or consignee until such time as it may be convenient to carry same forward for delivery,

IN WITNESS WHEREOF, the Agent of said STEAMER hath signed two Bills of Lading, one of which Bills of Lading being accomplished the others to stand void. And the Shipper has also signed this Bill of Lading.

Dated at Seattle, Wash., this 15th day of January, 1917.

F. C. & CO., INC.

G. C., For C. HENRY SMITH, INC. [137—115]

All of the provisions above and on the REVERSE SIDE of this BILL OF LADING are hereby agreed to on the part of the SHIPPER.

MOHNS COMMERCIAL COMPANY,
Shipper.
Per A. K. ALTENBACH.

Read conditions of Special Contract on the Reverse Side before Signing.

36. Carrier's liability hereunder shall be several and shall end and its rights dependent on delivery accrue immediately it has made delivery as above provided; and if freight be prepaid to Carrier beyond said first mentioned place of delivery. Carrier shall be shipper's agent for payment to other carrier of such freight as may be so paid for other carrier's use; and freight of every carrier of said packages by water other than C. Henry Smith, Inc.,

shall, at option of such carrier, be deemed earned when said packages shall be laden on board other carrier's vessel and shall be payable by shipper whether such other carrier's vessel or said packages be thereafter lost or not lost at any stage of entire transit;—no carrier shall be liable for delay or misdelivery or conversion or loss or damage unless it be shown that same occurred while said packages were in its possession."

"SOUTH AMERICA PACIFIC LINE.
C. HENRY SMITH, INC.,
Agents.
311 California St.,
San Francisco, U. S. A.

BILL OF LADING.

RECEIVED from C. Henry Smith for shipment from Port Ludlow, Wash., by Steamer "Regulus" of C. Henry Smith, Inc., Agents, or any other of said Company's Steamers, or Steamers employed by it, the following merchandise: ———

2. The said packages are to be forwarded with such reasonable dispatch as the general business of the Carriers will permit, by Steamer or Steamers of C. HENRY SMITH, INC., Agents, upon and under the same agreement and subject to all of the said Stipulations and Conditions hereon, and ON THE REVERSE SIDE hereof, to the port of destination or so near thereto as safe navigation of such vessel or vessels shall then permit, (but with option to the Master of the vessel or vessels to sail without pilots, tow and assist vessels, deviate, and to lighter, surf, tranship, land and reship said pack-

ages or any thereof, and to stop and to land and receive passengers and freight at other ports or places on or off the usual route, and in any order), and there, at vessel's tackles, and in like condition to be delivered unto the Consignee or his or their assigns or representatives, or if he or they be not on hand to so receive the same, or if said packages be destined beyond said port or place then to any lighterman or wharfinger or to any forwarder or other Carrier for and instead of the said named person, Company, assigns, corporation or representatives; and freight at tariff rates (unless otherwise agreed) and all charges advanced by Carriers and average shall be paid in full in U. S. Gold Coin on any such delivery, and full freight charges to be so paid on all damaged or unsound packages; and to secure payment of all such charges said packages are hereby pledged to [138—116] Carrier.

IN WITNESS WHEREOF, The Agent of said STEAMER hath signed one BILL OF LADING, one of which Bills of Lading being accomplished the others to stand void. And the Shipper has also signed this Bill of Lading.

Dated at Port Ludlow, this 4th day of September, 1917.

R. S. H.

For C. HENRY SMITH, INC., Agents.

All of the provisions above and on the REVERSE SIDE of this BILL OF LADING are hereby agreed to on the part of the SHIPPER.

C. HENRY SMITH,

By ————————,

Shipper.

Read Conditions of Special Contract on the Reverse Side Before Signing.

A letter marked Defendant's Exhibit 4–O is as follows:

**Defendant's Exhibit No. 4–O.**

"San Francisco, October 24, 1917.

"Mr. C. Henry Smith,

"311 California St.,

"San Francisco, Cal.

"Dear Sir.

"Replying to your favor of even date, in connection with the balance due our principal, as stated by you, we have the statement of the Sinaloa V–9, Governor Forbes Supplementary V–3, Baja California Supplementary V–12, and Regulus Supplementary V–2; besides the above, we require a statement covering the general average disbursements on account of the stranding of the Sinaloa, and also a general statement showing the balance due our principal to date.

"We will thank you for your prompt attention regarding this matter, as our principal is asking us to obtain all of these documents, and upon receipt of same, we will settle all matters pending between us.

"Regarding the inward freight on the 'Governor Forbes,' this was as follows, $40,992.98. Inasmuch as the vessel arrived here after October 1st, when the transfer took place, we feel that the commissions on this cargo should be for our account and not for yours, as we did all of the clerical work, etc., con-

nected with the receiving and delivering of this cargo.

"Regarding freight bookings prior to October 1st for shipment per Baja California or Regulus October/November, will state that there was no cargo contracted from your office excepting your lumber engagements, and [139—117] inasmuch as you booked them at a rate well under other lumber which we have contracted we believe you are not entitled to commissions on same.

"We trust that all matters will be settled in a friendly manner, as we look forward to carrying on business relations with you, connected with your exports to west coast ports.

"Yours very truly,
"A. O. LINDVIG,
"Per B. LINDVIG,
"General Agent."

"BL:D."

On November 8th, 1917, the defendant wrote to plaintiff the following letter (Plaintiff's Exhibit 11):

**Plaintiff's Exhibit No. 11.**

"November 8, 1917.

"Mr. A. O. Lindvig,
"Kristiania, Norway.

"Dear Sir:

"I have just received your letter of July 18th and contents noted.

"SS. BAJA CALIFORNIA.

"Referring to statement of bookings which you call attention to, would say that these bookings

were engaged before the increase of 25% took effect. In the regular trade it is always, of course, necessary to carry forward all contracts, whether there is an increase or not, in the rate of freight. This matter however has been fully explained to you as I believe you telegraphed regarding same.

"SS. GOVERNOR FORBES."

"Regarding the prices for the supplies for this vessel beg to advise that the men that you have now in your office here, can give you these figures, that you ask for, as they were attending to this matter while employed by me.

"STATEMENT FIRST OF JUNE.

"Regarding this voucher, we have sent you one as far as I remember and it is for attending to contract, making payments and keeping books for this vessel and also for protecting the contract

"Yours very truly,

"CHS:MC." [140—118]

On December 21, 1917, the plaintiff wrote to the defendant as follows:

"C. Henry Smith, Esq.,

"San Francisco.

"Dear Sir:

"Referring to my letter of 14th inst., I beg to state that I have found the following error in going through the account for 'Governor Forbes,' voyage 3:

" '7½% Commission inward freight $38,637.73,' which, of course, is meant to be 5%, and I shall

thank you to pay the difference to my Frisco office, viz, $965.93.

"Yours very truly,

"A. O. LINDVIG." [141—119]

**Plaintiff's Exhibit No. 13.**

S. S. SINALOA SALVAGE.

| | | | Balance on hand. |
|---|---|---|---|
| | | | 44,541.75 |
| June | 28. | Haviside, Withers & Davis | 6683.83 |
| | 28. | " " " | 3316.17 |
| | 29. | R. Ramirez, Rec. Clerk | 33.75 |
| | 30. | Muir & Symon | 188.39 |
| | 19. | C. Henry Smith, Launch Hire | 250. |
| July | 2. | Fife Wilson Lbr. Co. | 3000. |
| | 3. | Muir & Symon | 1000. |
| | 5. | Parr McCormick S. S. line | 26. |
| | 5. | Roberts & Co. | 73.32 |
| | 5. | Geo. W. Kneass | 153. |
| | 5. | Hotel Terminal | 12. |
| | 5. | Marshal Newell Sup. Co. | 1294.50 |
| | 5. | J. R. McGuffick | 1.20 |
| | 5. | West, Elliott & Gordon | 355.10 |
| | 5. | Federal Tel. Co. | 2.12 |
| | 5. | John Fohoney, Auto Hire | 2.50 |
| | 5. | Marshall Newell Sup. Co. | 72.16 |
| | 7. | G. W. Price Pump & E. Co. | 948.05 |
| | 12. | Plant Rubber Sup. Co. | 43.71 |
| | 12. | Pac. Coast Coal Co. | 135.20 |
| | 12. | J. R. McGuffick | 25.50 |

| | | | |
|---|---|---|---|
| | 12. | Muir & Symon | 1000. |
| | 16. | Capt. C. Bergersen | 100. |
| | 17. | Fife Wilson Lbr. Co. | 3000. |
| | 23. | Muir & Symon | 782.15 |
| | 23. | Crowley Launch & T. Co. | 4. |
| | 23. | West, Elliott & Gordon | 11. |
| | 23. | Fife Wilson Lbr. Co. | 1.15 |
| | 26. | Capt. Bergerson | 200. |
| | | | [142—120] |
| | 30. | Wells Fargo & Co. | 73.70 |
| | 30. | Glendon & Wick | 430. |
| | 30. | B. S. Free | 100. |
| | 30. | S. F. Bar Pilots | 54.22 |
| | 30. | Standard Oil Co. | 406.65 |
| Aug. | 1. | Parr McCormick S. S. Line | 750. |
| | 3. | Price Pump Co. | 500. |
| | 11. | H. R. Grothman | 49. |
| | 14. | Muir & Symon | 1000. |
| | 14. | Pac. Stev. & B. Co. | 687.93 |
| | 14. | Haviside Withers & Davis | 10000. |
| | 16. | Coggeshall L. & T. Co. | 737. |
| | 16. | Marshall Newell Sup. Co. | 356.03 |
| | 16. | Henry C. Petersen | 2. |
| | 16. | A. Bloom | 22. |
| | 16. | J. E. Walstrom | 30. |
| | 16. | C. D. Bunker | 21.50 |
| | 16. | Shipowners & Mcht. T. Co. | 150. |
| | 16. | Fyfe Wilson Lumber Co. | 300. |
| | 16. | Pac. Tel. & Tel. Co. | 13.85 |
| | 16. | Consulate of Norway | 30.08 |
| | 16. | Lloyds Register | 75. |
| | 16. | Standard Oil Co. | 219.48 |

| | | | |
|---|---|---|---|
| | 16. | M. A. Taylor..... | 449.35 |
| | 21. | G. W. Price..... | 850. |
| | 24. | Consulate of Norway..... | 44.40 |
| | 28. | Muir & Symon..... | 711. |
| Sept. | 4. | Wedderburn Trad. Co..... | 6411.00 |
| | 4. | King & Co..... | 2.38 |
| | 4. | Muir & Symon..... | 605.98 |
| | 4. | Pac. Stev. & Ballast Co..... | 414.47 |
| | | | [143—121] |
| | 6. | Sterling Laundry ..... | 19.80 |
| | 6. | Fyfe Wilson ..... | 1.13 |
| | 6. | Pac. Tel. & Tel. Co..... | 15.40 |
| | 6. | Geo. Price Pump Co..... | 200. |
| | 6. | U. S. Rubber Co..... | 22.20 |
| | 7. | Haller Cunningham ..... | 100. |
| | 7. | Eureka Boiler Wks..... | 494. |
| | 7. | Crowley L. & T. Co..... | 10. |
| | 12. | Federal Tel. Co..... | 1.12 |
| | 15. | Haviside Withers & Davis.. | 8691.60 |
| | 19. | A. Erskine ..... | 247. |
| | 25. | Capt. Sanners ..... | 175. |
| | 25. | Western Union ..... | 63.74 |
| | 27. | C. B. Harrison ..... | 173.32 |
| | 27. | Johnson & Higgins..... | 242.45 |
| | 27. | McNair Hdwe. Co..... | 11.77 |
| | 27. | Marconi Wireless ..... | 1.24 |
| | 27. | L. Curtis ..... | 25. |
| | 27. | Shipowners & Mchts. T. Co.. | 50. |
| | 27. | Haviside Withers & Davis.. | 346.76 |
| Oct. | 10. | Pac. Tel. & Tel. Co..... | 1.23 |
| | | | 59103.67 |
| | | | [144—122] |

Received in apparent good order and condition from
Recibido en aparente buena condicion exterior de

**MOHNS COMMERCIAL COMPANY.**

on board the Vor steamship called the
por embarcar en el vapor *Baja California* Master
capitan *N.O. Rustad* or substitute
o su representante

## C. HENRY SMITH, Inc.

311 California Street

SAN FRANCISCO,

U. S. A.

CABLES: CHENRYINC.

TRADE MARK

FREIGHT—FLETE

| | | | | | |
|---|---|---|---|---|---|
| ..... Kilos @ ..... | per 1000 Kilos= | | | | |
| ..... " ..... | " " " = | | | | |
| 51,000 lbs. | " 2000 lbs. = | | | | |
| ..... " ..... | " " 2240 " = | | | | |
| Primage } ..... | 10% = | | | | |
| Capa } | | | | | |
| ..... Cbm @ ..... | " Cbm = | | | | |
| ..... | 10 c. f. = | | | | |

| Marks — Marca | Numbers — Número | Number of pieces — Bultos | Package — Embalo | Contents — Contenido | Gross Weight — Peso Ko. | Remarks, Value, etc — Observaciones, Valor, etc. |
|---|---|---|---|---|---|---|
| G & Co. Antofagasta | N/N | 500 | burlaps | flour | | |

NON-NEGOTIABLE COPY

FREIGHT PREPAID

Consignees have option to lighter with their own Lighters.

to be delivered on deck of the steamer subject to the clauses of this Bill of Lading, at the port of
por entregar sobre cubierta del vapor bajo las condiciones estipuladas en este conocimiento en el puerto de *Antofagasta*

unto
á *order, Wolfy Gildemeister & Co.* or to his or their assigns.
ó á su ó sus mandatorios.

Freight for the said goods as per margin to be paid by shippers at port of loading against delivery of Bills of Lading.
Flete sobre las citadas mercaderias será pagado por los cargadores en el puerto de embarque, contra entrega de los conocimientos.

### SPECIAL CONDITIONS.

1. The Company or their agents are at liberty to lighter or to land the goods on the quay, wharf, into lighters, hulk, temporary, depot or lazaretto, at the risk and expense of the receivers or consignees of the goods. Cargo for Callao to be delivered against receipt to the Empresa Muelle y Dársena or to the Custom House. For such cargo a special surcharge of 5 shillings per freight-ton is to be paid to the agents of the ship at Callao. The ship is at liberty to commence discharging immediately after arrival at port of destination, and to continue discharging without any interruption at all hours of day and night, also on Sun and Holidays. All extra expenses incurred for the steamers quick dispatch to be paid by the consignees of the goods.

2. The responsibility of the owners ceases in all cases, when the cargo leaves the deck of the steamer, for which this Bill of Lading has been signed.

3. If the rate of freight is not charged in accordance with the tariff in force at time of shipment, both shippers and receivers are responsible for the difference, even in case the Bill of Lading states that the freight is prepaid.
The ship is at liberty to seize the cargo for any freight and expenses unpaid.

4. Receivers or consignees of cargo are not allowed to weigh or measure their goods on board the steamer at port of destination.

5. Any claims under this Bill of Lading will not be admitted unless made and properly attested within fourteen days after the discharge of the steamer and presented with the owners or their agents at the port of delivery.

6. The owners of the steamer hereby limit their responsibility for any loss, damage or incomplete delivery for not more than maximum Mk 1000.—for each package or for Mk. 2 per Cbdm or one kilo, as the freight may be calculated. The responsibility of the owners for all and any claim brought against them is limited in total to the value of the steamer and the freight earned under this voyage.

7. In accepting this Bill of Lading the shipper, receiver and owner of the goods agree to all printed, stamped or written conditions contained herein.

### CONDICIONES ESPECIALES.

1. La Compañía, por cuenta y riesgo del recibidor ó consignatario, queda autorizada á descargar y desembarcar la carga del vapor en el muelle y/o en lanchas, depositos flotantes, provisorios ó lazaretos. Carga destinada al Callao se entregará bajo recibo á la Empresa Muelle y Dársena ó á la Aduana. Por esta carga se cobrará por los agentes del vapor en el Callao un aumento especial de 5 chelines por tonelada. El vapor queda autorizado á empezar la descarga inmediatamente despues de haber entrado al puerto de destino, siguiendo trabajando sin demora dia y noche, tambien los Domingos y dias de fiesta. Todos los gastos habidos en la pronta descarga del vapor serán por cuenta del recibidor ó consignatario de la mercadeira.

2. La responsabilidad de la Compañia, cesa en el momento en que le carga sale de la cubierta del vapor, por el cual se firmó el conocimiento.

3. En caso que el flete no fuera estipulado conforme á la tarifa vijente de la Compañia, tal diferencia se hará valer contra el embarcador ó recibidor, respectivamente el consignatario, aunque los conocimientos indiquen flete pagado adelantado.
El vapor se reserva el derecho de poner embargo sobre la carga por flete y gastos no pagados.

4. No es permitido á los recibidores, de pesar y medir las mercaderias á bordo del vapor en el puerto de destino.

5. Reclamaciones solamente pueden ser consideradas al presentarse ellas con los comprobantes correspondientes á la Compañia ó á sus agentes dentro de los catorce dias siguientes á la descarga del vapor.

6. La Compañia queda unicamente responsable por perdidas, faltas, deterioros ó entrega incompleta hasta mil marcos por cada bulto ó dos marcos por decimetro cubico ó por kilogramo, segun el cobro del flete. La compañia en ningun caso responde por mayores perjuicios que por el valor del vapor y flete del viaje correspondiente.

7. El cargador, recibidor y dueño de la carga al aceptar este conocimiente aprueba todas las condiciones impresas y/ó anotadas en este conocimiento

In witness whereof the master or agent of the said ship has signed *three* Bills of Lading, all of this tenor and date; the one of which being accomplished, the others to stand void.
En virtud de lo cual el capitán ó el agente del citado buque ha firmado conocimientos de igual tenor y fecha. Siendo uno cumplido los otros quedarán sin efecto.

If required by the shipowner or his agents one of the Bill of Lading to be returned duly receipted in exchange for the goods.
Al exijirlo el armador ó sus agentes, un ejemplar de los conocimientos debe devolverse debidamente cancelado, contra entrega de la mercaderia.

Shipper
Embarcador **MOHNS COMMERCIAL COMPANY.**

per

*Seattle* el *21* *July* 19*15*

Master or Agent **FAWKNER, CURRIE & CO., Inc.**

*F.C.*

# General Rules for Steamer Bills of Lading.

(Outwards.)

RULE 1. The shipowner is responsible, so far as no exceptions are laid down in the following rules, for:
1) the ship, when starting on her voyage, being properly fitted out, equipped, manned and provisioned, as well as being put into a seaworthy condition to enable her to accomplish the intended voyage, except for any defects not discoverable by due diligence on the part of the ship owner.
2) Faults of his employees in connection with the proper stowage, custody, handling and delivery of the cargo.

RULE 2. The shipowner is not responsible for damage, injury and loss arising from:
1) the Act of God, perils of the sea, fire, explosions, collisions, strandings, and all other accidents of navigation.
2) enemies, pirates, barratry, pilferage, theft (unless it is proved that such pilferage or theft has been committed by the ship's crew), arrests or restraint of princes, rulers or people, jettison or seizure, fumigation, disinfection, or other sanitary measures of an official character, mutiny, boycott, strikes and lockouts.
3) bursting or exploding of steam boilers or pipes, breaking of shafts or loading and discharging gear and machinery, or any defect whatsoever in the ship, her appurtenances, or in the engines or boilers and their appurtenances (unless it is proved that such defect might have been noticed at the commencement of the voyage in exercising due diligence on the part of the shipowner).
4) vermin, damage done by rats and worms, rust, sweat, decay, shrinkage, breakage, heat, rain, climatic influences, oxidation, or consequences resulting from these causes, damage done on land or damage of any kind brought about by the inherent nature of the goods loaded or by the packing being insufficient, weak or contrary to regulations, or by the address, designation or marking being insufficient and contrary to regulations or by obliteration or disappearance of marks, numbers, addresses or designations of the goods loaded, even if such damage, injury or loss is brought about or increased by illegal acts, negligence, error in judgment or default of the pilot, master, ship's crew or other persons employed by the shipowner in carrying out his obligations. In such cases the parties concerned have to contribute to general average if any.

RULE 3. The shipowner is only responsible for damage, injury and loss caused by deterioration, putrefaction, bending, leakage or the consequences of same or by contact with or evaporation from other goods, if it is proved that such damages, injuries or losses have been caused by default of his employees, according to Rule 1, subsection 2.

RULE 4. The ship is at liberty to sail without pilots, to carry goods of any description, to tow and assist other vessels, and to deviate for saving human life and property.

The ship is at liberty to call at any ports in or out of the usual or advertised routes, in any order, or for any purpose, to transship the goods, if need be, and then to their destination in any other ship or ships, to go into drydock with the goods on board, to store them, as well as to transport them to and from the ship in lighters. In such as well as in other cases the insurance does not in any way concern the shipowner.

RULE 5. The ship is not responsible for gold, silver, precious metals, money, documents, jewelry, works of art, and similar valuables, unless a proper Bill of Lading, containing an explicit declaration of the value, has been signed.

If goods are carried on deck with shipper's consent, the shipper has all the risk in connection with this, also in respect of the loading, transporting and delivering of live stock, unless it is proved that the damage has been caused by faulty stowing or placing.

RULE 6. Shipper and receiver are liable for all damage, injury and loss caused to the ship, the shipowner, the cargo or persons by acids, inflammable, explosive, strong smelling or otherwise dangerous goods, if such goods have been loaded without any special agreement, and without an exact description as to their nature, no matter whether the shipper was aware of this or not, or whether he acted in his own name or in the name of others. In case the master fears danger from such goods, he may at any time destroy or throw them overboard without being liable for compensation.

RULE 7. Shipper and receiver are liable for all fines or losses which the shipowner, ship, or cargo may incur through non-observance of Custom House regulations or through the importation of the goods being prohibited, or through the marking of the goods, or the designation of the weight, value, or contents of the packages, whether on the packages themselves or in the Bill of Lading, being inexact or not satisfying the demands of the authorities. The shipowner is entitled in cases of incorrect declaration of contents, weights or values of the goods, to claim double the amount of freight which would have been correctly given, and, for the purpose of ascertaining the actual contents, weight or value of the packages, to demand from the shipper or receiver within one calendar year following upon the year of delivery the production of the original invoices of the manufacturer.

RULE 8. If the shipowner has given a receipt for goods which are still lying on the wharf or in lighters, he is only in so far responsible for them as he would be if the goods had already been taken on board and if the employees of those to whom the goods were entrusted would have been in his own service on board. This liability shall, however, not exceed the amount which the shipowner is able to recover from the party to whom he entrusted the goods.

RULE 9. The period after which the liability of the shipowner for the goods shipped on this Bill of Lading expires, and the manner in which the shipowner is to be notified in the case of damage, are fixed by the regulations given on the face of the Bill of Lading.

RULE 10. If on account of quarantine, threatening quarantine, ice, blockade, war, disturbances, strike, lockout, boycott, or reasons of a similar nature, the master is in doubt as to whether he can safely reach the port of destination, there discharge in the usual manner, or proceed thence in the voyage contemplated, he is at liberty to discharge at another place or harbor which he may consider safe, whereby his obligations are fulfilled. Receivers or shippers are liable for all expenses thereby incurred on the goods, and have to be informed if possible.

If the goods for any reason whatsoever cannot be discharged or cannot be found at the port of destination, the ship is at liberty to discharge them ou the return voyage, or to forward them by some other means to the port of dertination, for ship's account but not at ship's risk.

In the case of Through Goods from and/or to other ports or places the liability of the shipowner is restricted to his own line.

RULE 11. Full freight has to be paid on cargo damaged or diminished by leakage. For any increase in weight owing to sea damage no freight has to be paid.

RULE 12. The master has a lien on all goods for payment of freight, dead-freight, and difference in freight, and for any expenses incurred before or after shipment, including demurrage, cost of repairs, if any, cost for transport to the port of shipment, and forwarding expenses, fines, damages and expenses mentioned in these rules. The ship shall also be entitled to fall back on the shipper for the difference between the total amount owing to the shipowner and the net proceeds of the goods.

RULE 13. For claims in respect of loss, damage or incomplete delivery, the value of the goods shall be the cost price of the goods plus freight paid in advance and expenses incurred, but excluding duty, commission and interest. The shipowner is liable for each package or each measurement or weight unit, but not in excess of the amount stipulated on the face of this Bill of Lading. For any loss arising from faulty late or faulty incorrect delivery of the goods, the owner is liable to the extent as mentioned above, provided that such goods are not delivered within three months after arrival of the ship at the port of discharge.

RULE 14. Weight, measure, marks, numbers, quality, contents and value, although mentioned in the Bill of Lading, are to be considered as being unknown to the master unless the contrary has been expressly acknowledged and agreed to. The signing of the Bill of Lading is not to be considered as such an agreement.

RULE 15. General Average is to be adjusted according to York-Antwerp Rules, in shipowner's option at San Francisco or at a port of destination. The master has a lien on the goods for the contributions to General Average. In order to determine the contributions to General Average the receivers have to declare the value of the goods and if required by the master to sign an average bond or render sufficient security or deposit.

RULE 16. Freight payable at port of destination, together with all other amounts specified in Rule 12, is to be paid on delivery of the goods without deduction in cash and in the currency named in the Bill of Lading, or at the option of the receiver in the currency of the country at the highest rate of exchange for banker's sight bills current on the day when the ship is entered in at the custom house.

Freight payable in advance cannot be reclaimed, even if the ship and/or cargo should be lost. In calculating General Average contributions, freight paid in advance has to be added to the value of the goods.

RULE 17. All clauses contrary to the foregoing rules are null and void, unless such a clause has been specially agreed upon.

RULE 18. If differences of opinion should arise as to the interpretation of the foregoing rules, the ——— wording is to be the only conclusive one.

All disputes are to be decided according to ——— Law, and exclusively by the ——— Courts.

# Reglas Generales de Conocimientos para Vapores.

(De Salida.)

CLAUSULA 1. Salvo las excepciones estipuladas en las condiciones siguientes, el armador responde:
1. De que el buque antes de hacerse á la mar esté debidamente dispuesto, equipado, tripulado y aprovisionado, así como en estado de navegabilidad y aptitud para llevar á cabo el viaje proyectado, á menos que se trate de deficiencias eventuales de que no se viene en conocimiento aun poniendo todos los cuidados de un fletador cumplidor de su deber.
2. De las faltas de las personas á su servicio en la conveniente estivadura, custodia, manejo y entrega del cargamento.

CLAUSULA 2. El armador no responde de los daños, perjudicios y pérdidas que re ocasionen:
1. Por fuerza mayor, peligros de mar, incendios, explosiones, colisiones, varadas y demás accidentes de la navegación.
2. Por actos de enemigos, piratas, barratería, rateria, robo (á no ser que uno y otro se cometan por la tripulación), detenciones ó disposiciones de alta mano, alijo ó destrucción, fumigación. desinfección ú otras medidas sanitarias de carácter oficial, amotinamiento, guerra comercial (boicotaje), ruelgas y cierres (lockouts).
3. Por rotura ó explosion de calderas de vapor ó tuberias, rotura de gorjas ó de los aparejos de carga y descarga ó cualquiera otra avería en el buque ó en sus accesorios (á menos que la causa sea un defecto que podia haberse descubierto antes de la salida del buque poniendo el cuidado de un fletador cumplidor de su deber).
4. Por bichos, insectos ó otros roedores, apolilladuras, orin, moho, resumo, descomposición, mermas, rotura, calor, lluvia, influencias climatológicas, oxidación ó las consecuencias de estas causas, deterioro en tierra, perjuicios de cualquier clase que puedan resultar de la naturaleza ó vicio propio de las mercancias ó de sus envases defectuosos, frágiles ó ilicitos ó de marcas, direcciones y designaciones insuficientes ó inexactas ó por haberse borrado ó desaparecido las marcas, números, rotulaciones y direcciones de los bultos embarcados, aun en el caso de que á la presentación ó aumento de estos daños, deterioros y pérdidas hayan contribuido actos ilegales, descuido, errores ó faltas del práctico, capitán, tripulantes ó cualquiera otra persona al servicio del armador. En tales casos, el armador tiene derecho á exigir de los interesados las respectivas proratas de la avería gruesa.

CLAUSULA 3. El armador solamente es responsable de los daños, averías y pérdidas que re produzcan por ruina, putrefacción, torcimiento, derrame ó sus consecuencias y contacto con otros géneros y por sus emanaciones. en el caso de constar que las personas á su servicio hayan faltado contra lo dispuesto en la condición la, párrafo 2°.

CLAUSULA 4. El buque podrá navegar sin práctico, llevar á bordo todo género de mercancias, auxiliar ó remolcar buques, variar su ruta para salvar vidas y bienes.

Tambien es lícito al buque tocar puertos dentro ó fuera de su ruta ordinaria ó anunciada en cualquier órden y para cualesquiera fines, trasbordar las mercaderias y reexpedirlas á su punto de destino en cualquier buque ó en otros buques, entrar con la carga en dique, almacenarla y hacerla transportar en lanchas al, ó del buque, así como trasladarla desde el mismo á otra parte en lanchas. En estos casos, como en todos los demás, el seguro de las mercancias no es asunte del armador.

CLAUSULA 5. El armador no responde de la exacta entrega á los consignatarios de oro, plata, metales, preciosos, dinero, documentos, alhajas, obras artisticas y objetos de valor análogos, caso que de tales efectos no se haya firmado un conocimiento en regla con declaración expresa de su valor.

El cargador corre por su cuenta todos los riesgos de las mercaderias que se conduzcan con su autorización sobre cubierta, así como los de la respectiva carga y entrega de animales vivos, á no ser que los daños se originen por mala estiba ó colocación.

CLAUSULA 6. Los cargadores y receptores son responsables de todos los daños, deteriores ó pérdidas que re causen al buque, al armador, á la carga ó á las personas por ácidos, productos inflamables, explosivos, mal olientes ó peligrosos, en caso que hayan ridó embarcados sin convenio especial y sin indicar su verdadera naturaleza, lo mismo que el expedidor tenga conocimiento ó no de su condicion, como si ha obrado en su propio nombre ó en el de otras personas. En caso de capitán crea temer peligro á causa de tales mercaderias, está facultado para arrojarlos al mar ó destruirlos cuando ó como juzgue conveniente sin obligacion alguno de indemnizar perjuicios.

CLAUSULA 7. Los cargadores y receptores son responsables de todas las multas ó perjuicios que sufran el armador, el buque ó la carga por inobservancia de las ordenanzas de aduana ó por estar prohibida la importación de los articulos, por inexactitud ó insuficiencia de las marcas de los bultos ó en la declaración de peso, valor ó contenido de ellos, tanto en los envases como en los conocimientos y facturas consulares. En caso de declaración inexacta del contenido, peso ó valor de los bultos, el armador tiene derecho al doble del flete del que les corresponde pagar y puede exigir las facturas originales del fabricante para verificar el contenido, peso y valor verdaderos de los bultos, que el cargador ó el receptor le presenten hasta el fin del año siguente al de la entrega.

CLAUSULA 8. En caso que el armador diere recibo en resguardo de entregas de mercaderias existentes aun en el muelle ó lanchas, su responsabilidad será la misma que si los bultos hubieran tomado á bordo y los empleados del intermediario formasen parte de la tripulación. Sin embargo, la responsabilidad del armador no excederá nunca de la suma de que la persona intermediaria sea responsable ante él.

CLAUSULA 9. El érmino en que cesa la responsabilidad del armador con respecto á las mercancias embarcadas, por este conocimiento, y la forma en que deben hacérsele las reclamaciones, están indicados en las disposiciones que figuran en la cara del conocimiento.

CLAUSULA 10. Si el capitán creyere no poder tocar con seguridad el puerto de su destino ó desembarcar en el las mercancias en la forma acostumbrada ó anunciada con motivo de cuarentena ó amenazas de cuarentena ó de que la amenaza cuarentenaria ó por motivo de hielo, bloqueo, guerra, disturbios, huelga, cierre (lockout), guerra comercial (boycottage) ó otras causas análoga, esta autorizado para descargar las mercaderias en cualquier otro puerto que considere conveniente, desembarazándose así de todas obligaciones contraidas anteriormente. Los receptores ó cargadores son responsables de todos los gastos que las mercaderias ocasionen por cualquiera de las causas expreesadas y, á ser posible, serán avisados del desembarque.

Si por cualquier circumstancia, los bultos no pudieren desembarcarse ó no se encontraren en el puerto de destino, el buque podrá entregarlos á su regreso ó dirigirlos del modo que estime más oportuno al puerto de destino á su costó, pero no á su riesgo.

Tratandose de bultos en tránsito de ó para otros puertos ó puntos, la responsabilidad del armador se limita á su propia Linea.

CLAUSULA 11. La carga averida ó mermada por derrame esta sujeto á pagar flete integro. Por aumento de peso á causa de averia de mar no se paga flete.

CLAUSULA 12. El capitán tiene el derecho de retener la carga, como prenda pretoria, para asegurarse del cobro de los fletes, falta de fletes y fletes adicionales, de los gastos ocasionados por ella antes y después del desembarque, incluso los de demora, los eventuales de reparación, los de transporte hasta el puerto de embarque y los de recepción, de las multas, daños y gastos de que se hace mención en las condiciones precedentes. Igualmente tiene el derecho de hacerre pagar por el cargador la diferencia que resulte entre la suma total que se le deba y el producto liquido de la carga.

CLAUSULA 13. En el arreglo de las reclamaciones por pérdida, avería ó entrega incompleta de la carga, servira de base para la valoración de la misma su precio de costo incluso el flete pagado y los gastos de embarque habidos, pero con exclusión de los derechos de aduana, comisiones é intereses. El armador solo responde, por cada bulto, medida ó peso, en ningún caso, de una suma mayor á la consignada en la cara de este conocimiento. Por cualesquiera perjuicios que se ocasionen á causa de entrega retrasada ó defectuosa, el armador responde hasta la suma anteriormente fijada, en caso que no efectúe la entrega á los tres meses de la llegada del buque al puerto de desembarque.

CLAUSULA 14. El peso, medida, marcas, números, clase, contenido y valor se considerarán siempre como desconocidos para el capitán aun cuando estén indicados en el conocimiento, á menos que se haya convenido expresamente lo contrario. Haber firmado el conocimiento no se considerará como tal convenio.

CLAUSULA 15. En los casos de avería gruesa, se hará el arreglo y la liquidación según las reglas de York-Ambéres en San Francisco ó en uno de los puertos de destino, á opción del armador. Para asegurarse del cobro de las cuotas por razón de dicha avería, el capitán se reserva el derecho de retener la carga. Los receptores están obligados, para los efectos de sus contribuciones de la avería gruesa, á indicar el valor de las mercancias y á firmar un documento de obligación ó dar suficiente fianza, á elección del capitán.

CLAUSULA 16. Siendo el flete pagadero en el puerto de destino, deberá satisfacerse juntamente con todas las demás cantidades citadas en el párrafo 12 en el momento de efectuarse la entrega de la carga, sin descuento, en la moneda fijada, en el conocimiento ó, si lo desea el consignatario, en la moneda del pais al cambio, más alto del dia de la entrada del vapor en el puerto en cheque bancario de aquella moneda.

Es flete ya pagado de antemano no se devuelve, aun cuando se pierdan el buque y la carga. Para la prorata de la averia gruesa hay que añadir al valor de las mercancias el flete pagado por adelantado.

CLAUSULA 17. Todas las cláusulas que se opongan á las condiciones anteriores son nulas, á menos que no se haya estipulado especialmente otra cosa en contrario.

CLAUSULA 18. De haber disparidad de criterios en la interpretación de las disposiciones precedentes, el texto ——— sera el único válido y decisivo.

Todos los litigios se resolverán conforme á las leyes ——— y únicamente por los tribunales de ———

B/L No. ....

# C. HENRY SMITH, INC.,

311 CALIFORNIA ST. - SAN FRANCISCO, U. S. A.

## LOCAL BILL OF LADING

FROM Seattle TO Antofagasta PER STEAMER "Sinaloa"

SHIPPER Mohns Commercial Company CONSIGNEE Alberto Cabezas & Cia.

RECEIVED from Mohns Commercial Company shipment from Seattle by Steamer "Sinaloa" of C. HENRY SMITH, INC. or any other of said Company's Steamers, or Steamers employed by it, the following Merchandise, Marks, Numbers, Articles, Weights and/or Measurements as described below:

A. C. & Co. #1 - 200 cases Salmon
Antofagasta

COPY NOT NEGOTIABLE

all in apparent good order, except when otherwise noted—the value, weight, quantity, quality, or condition of contents of said packages not being known to the Carriers.

WHICH PACKAGES WERE RECEIVED AND ARE TO BE HELD AND CARRIED AND DELIVERED BY THE CARRIERS AND BY EACH SEVERAL SUCCEEDING CARRIER, UPON THE EXPRESS AGREEMENT AND SUBJECT TO ALL THE STIPULATIONS AND CONDITIONS HEREOF AND ON THE REVERSE SIDE HEREOF AND UNDER WHICH FREIGHT RATES ON SAID PACKAGES WERE ADJUSTED AND SAID PACKAGES RECEIVED FOR TRANSPORTATION, AND TO ALL OF WHICH THE SHIPPER HAS AGREED AND HEREBY DOES AGREE, AND EVERY HOLDER HEREOF SHALL BE HELD BOUND THEREBY WHETHER THE SAME BE PRINTED OR WRITTEN.

2. The said packages are to be forwarded with such reasonable dispatch as the general business of the Carriers will permit, by Steamer or Steamers of C. HENRY SMITH, INC. upon and under the same agreement and subject to all of the said Stipulations and Conditions herein, and ON THE REVERSE SIDE hereof, to the port of destination or so near thereto as safe navigation of such vessel or vessels shall then permit (but with option to the Master of the vessel or vessels to sail without pilots, tow and assist vessels, deviate, and to lighter, surf, transship, land and reship said packages or any thereof, and to stop and to land and receive passengers and freight at other ports or places on or off the usual route and in any order), and there, at vessel's tackles, and in like condition to be delivered unto the consignee or his or their assigns or representatives, or if he or they be not on hand to so receive the same, or if said packages be destined beyond said port or place then to any lighterman or wharfinger or to any forwarder or other Carrier for and instead of the said named person, company, assigns, corporation or representatives; and freight at tariff rates (unless otherwise agreed) and all charges advanced by Carriers and average shall be paid in full in ..... on any such delivery, and full freight charges to be as paid on all damaged or unsound packages; and to secure payment of all such charges said packages are hereby pledged to Carrier. Vessel.

3. Goods in refrigerator. Steamer shall not be accountable for the condition of goods shipped under this Bill of Lading nor for any loss or damage thereto arising from failure or breakdown of machinery, insulation or other appliances nor for detention, nor for the consequences of any act, neglect, default or error of judgment of the Master, Officers, Engineers, Crew or other persons in the service of the Owners, nor for any other cause whatsoever, and steamer shall be at liberty to jettison the whole or any part thereof if considered necessary on account of such damage.

4. In no event shall Carrier be liable for loss of or damage to any package, after it shall be unhooked from vessel's tackles.

5. It is also understood that if by fog, surf, bad weather or other causes, in the judgment of the commander, the Steamer be prevented from carrying cargo at said port of destination, the Steamer is to have the privilege to store the said goods at Ancon or any other port, or retain the same on board the Steamer, at the expenses and risk of the owners, until such time as she may be able to discharge cargo at the place of destination or trans-shipment.

6. Freight payable in advance, in United States of America Gold Coin, at the rate as per margin, together with all charges incurred for storage, and other necessary expenses on all part of delivery. Freight payable on weight or measurement received to be delivered, at Carrier's option.

7. All lighterage from Steamer to Steamer and/or between Steamer and shore of goods named in this Bill of Lading, shall be at the risk of owner, shipper or consignee.

8. Glass, crockery, or other articles contained in glass or crockery, or Castings, or any article whatever of a fragile nature, taken only at risk of shipper, owner or consignee.

9. It is mutually agreed, that the liability of any carrier, as to goods destined beyond its own route, shall be terminated by proper delivery by him to the next succeeding carrier.

10. This Bill of Lading shall have the effect of a Special Contract not liable to be modified by a receipt from or any act of an intermediate carrier.

11. It shall be the duty of the Shipper, Consignee, Owner, or his Agent or representative, to examine the said packages BEFORE REMOVAL by him to ascertain whether any part thereof shall be in a damaged condition or shall have been lost or shall be missing or not present for delivery to him; and BEFORE REMOVING any part thereof, he shall make and deliver in writing to the Steamer's Agent, a statement of any claim for any loss of or damage to or the absence of any part of said goods which could have been ascertained by him upon such examination before such removal of said goods; and a failure to make such examination and present such statement, shall be conclusive evidence in favor of the carriers that all of said packages were delivered in accordance with the conditions of this Bill of Lading and that there was not any loss or damage or absence of any part of such goods which, if it had existed, could have been discovered upon making such examination before taking away or removal of said packages.

12. Liability of Carrier shall in no event be greater than that provided by Sections 4281, 4282 and 4283 of the Revised Statutes of the United States of America, and an Act of the Congress of said United States of America, entitled: "An Act relating to navigation of vessels, bills of lading, and certain obligations, duties, and rights in connection with the carriage of property"—the "Harter Act" so-called—approved February 13th, 1893, and Carrier shall have all rights and benefits granted to shipowner or carrier by all provisions of all sections of said Revised Statutes and all Acts of the said Congress and all Statutes or laws of any State or place where claim herein may be asserted, limiting or permitting a limitation of a ship-owner's or carrier's liability, together with the benefit of all laws of Mexico or Central American Republics, further limiting or permitting a limitation of such liability.

13. If the owner of the vessel shall have exercised due diligence to make said vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from fault or negligence or error of the pilot, master or crew in the navigation or management of the vessel, or from latent or other defect, or unseaworthiness of the vessel, whether existing at the time of shipment or at the beginning of the voyage, or during the voyage, but not discoverable by due diligence, the consignees or owners of the cargo shall not be exempted from liability for contribution in General Average both to vessel as well as to cargo, or for any special charges incurred, but, with the vessel owner shall contribute in General Average, and shall pay any such special charges as if such danger, damage or disaster had not resulted from such fault, negligence, error, latent or other defects, or unseaworthiness. Passengers' effects, if any, not to contribute in General Average, but claims for passengers' effects ascribed to be allowed in General Average, less their amount contributed in such case. General Average payable according to York-Antwerp Rules of 1890, OR OTHERWISE, as CARRIER interested shall elect.

14. The carrier, charterer, agent and/or owner of the vessel shall only be required to exercise due diligence to make the vessel in seaworthy condition at the time of shipment, commencement of the voyage, or on the voyage, and if such due diligence has been used to make the vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, owner, agents, charterers nor the carrier shall become or be held responsible for damage or loss resulting from unseaworthiness, explosions, bursting of boilers, breakage of shafts, machinery or appurtenances, latent defects in the hull, machinery, boilers, rigging, ropes, appurtenances, equipment or appliances, or from any other causes of what kind whatsoever.

15. It is agreed, that if said packages be herein consigned otherwise than "to Order" or "to Order of Shipper" that this instrument, whether Receipt or Bill of Lading, shall not be negotiable nor carrier required to surrender same as surrender hereof as a condition of delivery to consignee hereon named; and that when so consigned "to Order" or "to Order of Shipper," this Bill of Lading or Receipt or a place of delivery to be notified of arrival shall be given by Shipper and be written hereon. If any of said packages contain dangerous or inflammable or explosive material the shipper and consignee shall each be liable to Carrier for all loss and damage resulting therefrom and Carrier or its ship master may destroy any such package without liability therefor.

16. C. Henry Smith, Inc., reserves the right, in the event of any taxable arising between the Company and any of the Central American Republics, to store the cargo at the risk and expense of owner, shipper and/or consignee until such time as it may be convenient to carry same forward for delivery.

17. Manifest of goods must be furnished one day before ship's departure. Fines imposed on Steamer in any Mexican port, on account of such manifest not being furnished in due time, or errors or omissions therein to be paid by the consignee of goods. The expense of stamped paper and other Custom House charges for landing and delivering goods at port of destination must be paid by the consignee thereof. Shippers will sign this Bill of Lading as such in the under right hand margin.

IN WITNESS WHEREOF, the Agent of said STEAMER hath signed TWO BILLS OF LADING, one of which Bills of Lading being accomplished the others to stand void. And the Shipper has also signed this Bill of Lading.

Dated at Seattle, this 25th day of January 19 17

For C. HENRY SMITH, INC.

All of the provisions above and on the REVERSE SIDE of this BILL OF LADING are hereby agreed to on the part of the SHIPPER.

Mohns Commercial Company
Shipper.

Read Conditions on Reverse Side Before Signing.

Shippers must sign in full in ink, or if rubber stamp is used the name of the individual signing on behalf of the Shipper must be in ink.

Valued at $.....

FREIGHT RATING AND CHARGES

FREIGHT PREPAID

300 ft @

@

@

@

RATES AND/OR MEASUREMENTS SUBJECT TO CORRECTION

178

# Stipulations and Conditions Referred to on Face Hereof and All of Which are Agreed to by Shipper

19. Carrier shall not be or be held liable for any loss of or from or damage to any of said packages that shall result from any of the following causes, to-wit, acts of enemies, pirates, thieves, robbers, arrest or restraint of princes, rulers or people, attachment, acts or takings or claims or restraints of government or municipal or public authorities whether acting with or without lawful authority; riots, strikes or sabotage of labor; stoppage in transit or claim of right thereto, fire or water on wharf or land or port or fire in hatches landed on or after unloaded from vessel or collapse of or destruction of or damage to wharf or pier or its coverings, nor if ship owner shall have exercised due diligence to make the vessel on which said packages be shipped in all respects seaworthy and properly manned, equipped and supplied shall Carrier be liable for any loss or damage that may result from or be caused by any one or more of the following causes, to wit, perils of the sea or other waters, fire on board vessel, barratry of master or crew, or other persons, masters' or crews' negligence, proper or latent defects, whether existing at time of shipment or at the beginning of the voyage, in or breakage of or fractures of or explosions of boilers or their appurtenances, valves, pipes, machinery or appurtenances or from explosion, bursting of boilers, collision with vessel or other structure or object, stranding or peril of navigation, condition, fault or error in navigation of vessel, fault or error in management of vessel or of its engines or machinery, burning of vessel, breakage of shafts or of lights, valves, cocks, pipes, leaks and their connections and this whether such fault or error is before or after the beginning of the voyage and whether any negligence of such due diligence shall not be presumed, but the same must if claimed or alleged be proven by shipper.

20. Carrier shall not be or be held liable for leakage or wastage of contents of any package nor for breakage of or damage to contents of any package unless shipper first show that such package was of proper strength and in good condition, and that such contents were properly packed therein and in good order when delivered to the Carrier and that the package was, while in possession of Carrier, so resealed or broken as to cause such loss or damage complained of; nor shall Carrier be or be held liable for any such contents not specified herein, nor for loss from package or damage to property shipped in loose, unbaled condition, such as coal, salt, grain, seed, fruit or in part of glass, crockery, queensware, porcelain, hollowware, pictures, picture frames, stones, or other articles of extraordinary value, nor for loss, damage or deterioration of perishable property, stains to packages, contagion or moisture received from such or other freight, nor for loss, damage or deterioration of live animals, nor from vermin, insisting or bending of metals shipped loose or in bundles, loss or damage resulting from any burning of any combustible cargo, loss or damage resulting from or because of proper marks or description, or from delay, unless it be first proven by shipper that such loss or damage was caused by the negligence of Carrier, nor for loss or damage or failure in proper loading, stowage, custody, care or proper delivery of said packages. Each package shall be the basis of settlement for any loss or damage claimed, except that if not so marked a degrees of full number of packages of like supposed contents with out regard to quality or quantity, and the actual contents of packages shall in no case be questioned hereunder and if any of said packages shall be delayed or go astray or be else where landed because not properly marked, Carrier shall not be liable therefor. Carrier shall not be liable therefor. Live stock, all perishable property, all live freight and all property packed in second-hand or worn packages, or in bags, or in baskets or owner's risk and neither fault nor failure nor improper loading nor bad stowage nor improper rush or not sound order and condition at delivery of or by Carrier shall be presumed but same must if alleged be proven by shipper.

21. Advance charges shall be repaid to, and prepaid freight shall be retained by, Carrier whether vessel or other conveyance and cargo or any part thereof be lost or not and if all freight and charges due Carrier be not paid after arrival of vessel, Carrier may sell said packages at either public or private, and as agent for and in the name of owner and apply proceeds in payment of freight and all other charges, and if same as realized be not sufficient to pay same in full, Carrier may have recourse as made, the shipper shall, on demand, pay all such charges or make good such deficiency as the case may be, and when such charges are paid, all claims of shipper or consignee property when in his opinion same would become decayed or worthless before it could be delivered as herein provided for or if not sold or delivered and if full freight thereon and all charges shall be paid by shipper.

22. The said packages shall be received by carrier at vessel's tackle immediately on her arrival at her said place of delivery without regard to weather, if consignee be not on hand to receive packages or direct disposition thereof, and may be placed on lighterman or wharfinger or other party or person believed by Carrier to be reasonable and who will take charge of said packages, and such delivery to be complete and to be landed on wharf or bench or bank or stored in hulks or put in lighters for the owner and at owner's risk and expense.

23. The person who signed this bill of lading as accepting the terms thereof was such stated be the shipper in sign same for shipper, and such person shall be liable for any loss of or damage to said packages nor for any damage or loss suffered in connection therewith unless such loss or damage shall have resulted from the sole cause of the same and if Carrier become liable for any such damage or loss it shall limit same to the actual loss sustained and not insurance proceed upon said packages. Collectors of customs are hereby authorized to grant a general order for discharge immediately on arrival at custom house.

24. All claims of shipper or consignee or other parts in interest against Carrier or its vessels or the masters thereof for any loss of or damage to or conversion of or the delivery of or delay in delivery of said packages shall be deemed waived unless filing presented to Carrier or its Agent within sixty days from date of notice of any such loss or damage, delay or arrival and unless suit thereon be brought in any court in district of earliest newspaper mention of loss or stranding of such vessel on voyage shall such be and the date of such stranding of such claim be and be presented within said sixty days, such claim shall be null by every court be held to be then released by shipper and no liability thereafter and no suit for any such claim as presented or to recover for any such loss or damage, etc. shall be maintained unless such claim be presented as aforesaid and unless suit commenced and summons be served on Carrier within sixty days from and after the day and date that such claim fail to be so presented, and if Carrier's vessel be lost or missing a great further time for the commencement of such suit the same may be commenced within the time so prescribed from the date of such loss or missing vessel, which said sixty days or within such further time so granted by Carrier shall be and be every court be held to be barred, and all liability of Carrier for package, and all by complaint therein shall be so held to have been released by shipper, owner and consignee, and to be absolutely void and of no effect.

25. All liability for loss or damage to goods shall be determined by their invoice cost plus freight. It is expressly understood that the Carrier shall not be held accountable for waste, leakage, breakage, insecure packages, chafage to goods in bales, nor for loss or damage from the effect of sea water, fresh water, or other liquids in contact or otherwise when properly stowed; nor for exhibition of articles on freight or otherwise, nor from unavoidable decay, nor for any loss or damage to any part of the goods named in this Bill of Lading are hereby valued at not exceeding $100.00 per package, and unless a greater value is written opposite the articles mentioned herein, the liability of the Consignee therefor, in case of the total loss of all or any of the said goods from any cause, shall not exceed $100.00 per package, and in case of the partial loss of or damage to any of said goods, the liability of the Carriers shall not exceed such amount per package as the loss or damage on each package shall bear to the sum of $100.00.

26. The shipper hereby represents and declares that the value of each package described on the face of this Bill of Lading does not exceed the sum of $100.00 unless the shipper shall expressly declare and there shall be written on the face hereof a different value, and hereon such declaration is made and the rate of freight or charges for freight thereon is adjusted.

27. If steamer be disabled on voyage, Carrier may forward said packages to port of delivery by other conveyances at option of its ship master and shall receive additional compensation for such service and Carrier may tranship said packages on its own vessels or the use of strangers; and if salvage services be rendered to shipper or said packages by vessels or vessels of Carrier, such service shall be at full pay and paid for as if rendered by strangers.

28. Carrier is not and shall not be required to deliver said packages at port of delivery at any particular time or to meet any particular market or in time for any particular use; and should any consignee, owner or other person or forwarder or carrier at place of delivery to there receive packages as discharged from vessel and packages may be discharged immediately on arrival of vessel at port or anchorage or wharf or landing.

29. Carrier's vessels are not warranted seaworthy save in so far only as exercise of due care by Carrier in the selection and employment of competent officers and attention in their duties and their selection and appointment of ship masters and officers and engineers and crew have accepted or may accept it.

30. Carrier shall not be liable for any loss of or any damage by fire to any of said goods capable of being covered by insurance.

31. The shipper shall be liable for any loss or damage to steamer, cargo, lighter or wharf, caused by inflammable, explosive or dangerous goods, shipped without full disclosure of their nature, whether such shipper be principal or agent; and such goods may be thrown overboard or destroyed at any time without compensation. Extra charges, if any, for discharging, lightering or other expenses on hazardous goods, declared or considered as such by civil or military authorities, must be borne by the shippers and/or consignees.

32. The steamer shall have a lien on the goods for all freights, primages or charges, and also for all fines or damages which the steamer or cargo may incur or suffer by reason of the illegal, incorrect or insufficient marking, numbering or addressing of packages or description of their contents. Invoices must be made out in accordance with the Custom House regulations and regulations of the Port, Harbor authorities, Consular, Board of Health or other certificates required to accompany the goods are to be produced by shippers, and any detention, delay, charges or penalties incurred or occurring to cargo or steamer, owing to the want of such certificates, are to be borne by the shippers and/or consignees. Steamer or its owner will not be responsible for delay in the delivery or in the over-carriage of goods not plainly marked with the port of destination, and the name and address of the consignee.

33. It is expressly stipulated that if said packages need to be lightered at any time or place whatsoever, all lighterage or expenses incurred shall be deemed to have been rendered by an independent carrier or person, if such services be procured by Carrier they shall be deemed to be and to have been so rendered by Carrier as the agent therefor of shipper, and Carrier's liability as carrier at any port or place whose said packages shall end pursuant hereto shall end immediately upon the delivery of same to said port or place. Carrier's liability after steamer be at anchor at or near to said port of destination or of warehousing said packages after unhooked from ship's tackles at such anchorage be at owner's risk.

34. Should, in the opinion of the master, the weather or sea be such as to cause an injury to the ship by detaining her at the port of delivery, or that she cannot proceed, the ship may proceed to her next regular port of call, from whence the owner-carried cargo may be returned at the expense and risk of shipper, owner or consignee. In case the entry of the port of discharge or transhipment or communication therewith cannot be effected by the ship, or if on account of infectious disease or any subsequent port, or in case of the master considering the entry of said port or any part, such fear, danger or otherwise, or should a vessel be injured in the performance of the steamer's intended voyage, the goods may be landed or put into a lazaretto or other proper place at such port or ports as the master may consider the master may consider safe, at shipper's risk and expense, and such discharge shall be deemed a full and final delivery and all the liability of the carrier and consignee shall absolutely cease. In the event of quarantine, the goods may be discharged on board any other vessel or receptacle necessary or proper for the ship's discharge, at the consignee's risk and expense as the master may direct. Any goods which shall be landed and there land them or transship them, and address mailed to the consignee, if named, otherwise to the owner, shall be deemed under this contract to be transported and delivery of said goods under this Bill of Lading, and such goods shall be liable and a lien thereon for all charges. In all quarantine cases the responsibility of the ship is prevented by quarantine from reaching her destination, or making due delivery of the goods, such goods may be sold at quarantine. The goods may be delivered at quarantine to shipper, owner or consignee, discharged into deposits, lazarettes, hulks, crafts or lighters, at the risk and expense of shipper, owner and consignee, and any act of the master relating to such discharge shall be deemed a full and final delivery of the goods, all risk, responsibility and liability of the Carrier therefor, as carrier, shall cease and determine as soon as the goods are delivered from the ship's tackle, and all expenses thereby or there after incurred shall be forthwith repaid or on demand paid by shipper, owner and consignee, all and any of them. The Carrier retaining a lien on the goods therefor, and for all costs, charges and expenses incurred, and for any sum which may be demanded or claimed by Carrier's agent from original point or port of shipment to port of delivery shall be also then earned.

35. "Carrier" includes stockholders and vessels and masters thereof, "packages", means all property mentioned or referred to on face hereof, and "owner" and "owners" mean shipper and all owners of said packages and all pledgees thereof other than "Carrier's pledgees" and "Carrier" and "Carrier's agent" mean the vessel and each of Carrier's agents and all pledgees thereof other than "Carrier's pledgees" and "Carrier" and "Carrier's agent" mean the vessel and each of Carrier shall not be liable for any loss or damage unless it be shown to have entirely resulted from the negligence of Carrier without default.

36. Carrier's liability hereunder shall be several and shall end and its rights hereunder shall cease and delivery accrue immediately upon the discharge of said and if freight be pressed to carrier beyond said first mentioned place of delivery. Carrier shall be entitled to charge and receive freight thereon from said first place of delivery paid for other carrier's own; and freight of every carrier of said packages by water shall be deemed earned when said packages shall be laden on board other carrier's vessel and shall be payable forthwith to such other carrier's agent, whether such vessel be lost or not lost at any stage of entire transit;—no carrier shall be liable for delay or loss of possession or loss or damage unless it be shown that same occurred while said packages were in its possession.

37. The rights and liabilities of all carriers by water shall be determined hereby; if it shall deliver said packages to other carrier for carriage, such delivery shall be made as shipper's agent, and not as carrier, and if such delivery be to any carrier by water, such carrier whether agrees to be bound by these conditions or not, receipt of such transfer receipt, shipping receipt, or bill of lading as may be in use for such carrier shall be deemed such carrier's agreement to like duties as are herein imposed.

38. Carrier shall have a lien on said property for all fines imposed on it and for all expenses incurred resulting from shipper's failure to furnish proper Consular or Custom House papers in due time or supplying same or incorrect papers or in accurately, and all fines and extra expenses shall be reimbursed to Carrier by consignee before said property shall be delivered to him.

39. All expense of conperage and repairs of packages shall be paid by shipper.

40. The Carrier is hereby expressly granted the right and option of delivering the said packages represented by this Bill of Lading to any consignee from all points of landing and storing said merchandise either in lighters, hulks or wharf, or in Carrier's warehouses, at the risk and expense of consignee, and the delivery of said merchandise, without notice to and at the expense of consignee, and in the event of such landing and storing said merchandise, the Carrier is thereupon and thereby released from all further liability for loss or damage thereafter, whether arising from the fault of Carrier or not.

41. That merchandise on wharf or in warehouse awaiting shipment, transhipment or delivery, shall be at owner's risk of loss or damage by fire, flood, and/or the giving way of wharf, and/or the destruction in whole or in part of the wharf, and/or shed, or any structure thereon, not happening through the fault or negligence of Carrier or its servants, and that the fault of the Carrier shall be the sole proximate cause of or damage to goods by fire while upon its vessels, or before loading thereon or after discharge therefrom, and the same liberties as to fire are granted to all vessels of the Carrier.

42. If the owner shall have exercised due diligence to make the steamer in all respects seaworthy, and to have her properly manned, equipped and supplied, is in case of any peril, danger or accident in sea or damage or disaster resulting from faults or errors in navigation, or in the management of said steamer, or from unseaworthiness, whether existing at the time of shipment or at the commencement of the voyage or any latent defect in hull, machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the commencement of the voyage or any latent defect in hull, machinery or appurtenances, or from unseaworthiness was not discovered or discoverable by the exercise of due diligence), the owner shall not be liable thereby for any loss or damage or delay or for any fire, explosion, pet, leakage, and any special charges incurred in respect of the cargo, and shall be entitled to the benefit of all limitations of, and exemptions from liability accorded to owners or owners of a General Average nature that may be made or incurred for the common benefit, or to relieve the adventure from any common peril or all with the same force and effect, and in the same extent, as if such loss or damage or delay or danger or disaster had not resulted from faults or errors in navigation or in the management of the vessel, or any latent defect or unseaworthiness.

43. Also that in case any steamer of the Carriers under this Bill of Lading be fastened by the various agencies or otherwise the ship owners shall not be liable for any loss, damage or deterioration resulting from such fumigation.

44. Shipper to pay seventy-five cents per package specified in the Bill of Lading for all arrearages of freight and charges due by the same owners or consignees to the Carrier, and the Carrier shall not be liable for loss, detriment or delay in the transportation thereof, imposing any liability hereunder, the carrier in whose actual custody they were at the time of such loss, damage, detriment or delay, shall alone be responsible therefor. The receipt of any carrier for the goods shall be prima facie evidence of the condition in which he received them in a suit against any other carrier.

44. In the event of any cargo being accepted and carried with freight charges to collect at destination, and if through insufficiency of containers or any other cause whatsoever, such cargo or any part thereof is refused by the consigning carriers, and the Carrier having such cargo in possession at the time of such refusal is compelled to return the same to the port of origin or otherwise dispose of the same, all freight and other charges and all expense of every nature whatever, that may be reasonably incurring in the rehandling and/or discharge of said cargo, shall be a charge and lien upon and against said cargo, payable by the shipper, owner and/or consignee, prior to taking delivery or effecting reshipment of such cargo.

# SOUTH AMERICA PACIFIC LINE

## C. HENRY SMITH, INC., Agents

311 CALIFORNIA ST. - SAN FRANCISCO, U. S. A.

S. S. BAJA CALIFORNIA
SINALOA

## BILL OF LADING

S. S. REGULUS
GOVERNOR FORBES

S. S. "BAJA CALIFORNIA" Voy.

SHIPPER: Mohns Commercial Company

CONSIGNED TO (Mail Address - Not for purposes of Delivery): M.Herrera

Port of discharge / Through rate to: Antofagasta.

RECEIVED from Mohns Commercial Company, shipment from Tacoma, Wash. by Steamer Baja California of C. HENRY SMITH, INC., Agents, or any other of said Company's Steamers, or Steamers employed by it, the following Merchandise, Marks, Numbers, Articles, Weights and/or Measurements as follows:

| MARKS | NO. PKGS. | DESCRIPTION OF ARTICLES | WEIGHT | CUBIC FEET |
|---|---|---|---|---|
| M f1. Antofagasta | 100 | cases Canned Salmon | | 150 |

V.B. Mayo 27 1917
Seattle, Wash.
Luis A.Santander.
Consul de Chile en el Estado de Washington.

Certifico se han agotado las diligencias Consulares
L.A.S.
Consul.

all in apparent good order, except when otherwise noted—the value, weight, quantity, quality, or condition of contents of said packages not being known to the Carriers.

**Delivery of Lumber to be taken at average rate of M ft, per day, and general cargo at average rate of not less than 500 tons per day, or when less than 500 tons delivery to be taken on day of arrival, Sundays and holidays only excepted, failing which demurrage is to be paid at the rate of $1500.00 U. S. Gold per running day for S. S. REGULUS and $750.00 per running day for other steamers.**

**Should the steamer be fumigated by the Clayton apparatus or otherwise any damage resulting by such fumigation to goods shipped will not be accounted for by the owners or agents of the steamers of this line.**

1. WHICH PACKAGES WERE RECEIVED AND ARE TO BE HELD AND CARRIED AND DELIVERED BY THE CARRIERS AND BY EACH SEVERAL SUCCEEDING CARRIER, UPON THE EXPRESS AGREEMENT AND SUBJECT TO ALL THE STIPULATIONS AND CONDITIONS HEREON AND ON THE REVERSE SIDE HEREOF AND UNDER WHICH FREIGHT RATES ON SAID PACKAGES WERE ADJUSTED, AND SAID PACKAGES RECEIVED FOR TRANSPORTATION AND TO ALL OF WHICH THE SHIPPER HAS AGREED AND HEREBY DOES AGREE, AND EVERY HOLDER HEREOF SHALL BE HELD BOUND THEREBY WHETHER THE SAME BE PRINTED OR WRITTEN.

2. The said packages are to be forwarded with such reasonable dispatch as the general business of the Carriers will permit, by Steamer or Steamers of C. HENRY SMITH, INC., Agents, upon and under the same agreement and subject to all of the said Stipulations and Conditions hereon, and ON THE REVERSE SIDE hereof, to the port of destination or so near thereto as safe navigation of such vessel or vessels shall then permit (but with option to the Master of the vessel or vessels to sail without pilots, tow and assist vessels in distress, and to lighter, transship, land and reship said packages or any thereof, and to stop and to load and receive passengers and freight at other ports or places on or off the usual route and in any order), and there, at vessel's tackles, and in like condition to be delivered onto the consignee or his or their assigns or representatives, or if he or they be not on hand to so receive the same, or if said packages be destined beyond said port or places than to any lighterman or wharfinger or to any forwarder or other Carrier for and instead of the said named person, company, assigns, corporation or representatives, and freight at tariff rates (unless otherwise agreed) and all charges advanced by Carriers and average shall be paid in full in U. S. Gold Coin on any such delivery, and full freight charges to be so paid on all damaged or unsound packages; and to secure payment of all such charges said packages are hereby pledged to Carrier.

3. Goods in refrigerator Steamer shall not be accountable for the condition of goods shipped under this Bill of Lading nor for any loss or damage thereto arising from failure or breakdown of machinery, boilers, or other appliances nor for detention, nor for the consequences of any act, neglect, default or error of judgment of the Master, Officers, Engineers, Crew or other persons in the service of the Owners, nor for any other cause whatsoever, and steamer shall be at liberty to jettison the whole or any part thereof if considered necessary on account of decomposition.

4. In no event shall Carrier be liable for loss of or damage to any package, after it shall be unloaded from vessel's tackles.

5. It is also understood that if by fog, surf, bad weather or other causes, in the judgment of the commander, the Steamer be prevented from discharging cargo at said port of destination, the Steamer is to have the privilege to discharge said goods at Arica or any other port, or retain the same on board the Steamer, at the expense and risk of the owners, until such time as they can be delivered with safety at the place of destination or trans-shipment.

6. Freight payable in advance, in United States of America Gold Coin, at the rate as per margin, together with all charges incurred for storage, and other necessary expenses at port of delivery. Freight is payable on weight or measurement received or delivered, at Carrier's option.

7. All lighterage from Steamer to Steamer and/or between Steamer and shore of goods named in this Bill of Lading, shall be at the risk of owner, shipper or consignee.

8. Glass, crockery, or other articles contained in glass or crockery, or Castings, or any article whatever of a fragile nature, taken only at risk of shipper, owner or consignee.

9. It is mutually agreed, that the liability of any carrier, as to goods destined beyond his own route, shall be terminated by proper delivery by him to the next succeeding carrier.

10. This Bill of Lading shall have the effect of a Special Contract not liable to be modified by a receipt from or any act of an intermediate carrier.

11. It shall be the duty of the Shipper, Consignee, Owner, or his Agent or representative, to examine the said packages BEFORE REMOVAL by him to ascertain whether any part thereof shall be in a damaged condition or shall have been lost or shall be missing or not present for delivery to him; and BEFORE REMOVING any part thereof, he shall make and deliver in writing to the Steamer's Agent, a statement of any claim for any loss of or damage to or the absence of any part of said goods which could have been ascertained by him upon such examination before such removal of said goods, and a failure to make such examination and present such statement, shall be conclusive evidence in favor of the Carrier that all said packages were delivered in accordance with the conditions of this Bill of Lading and that there was not any loss or damage or absence of any part of such goods, which, if it had existed, could have been discovered upon making such examination before taking away or removal of said packages.

12. Liability of Carrier shall in no event be greater than that provided by Sections 4281, 4282 and 4283 of the Revised Statutes of the United States of America, and a Act of Congress of said United States of America, entitled: "An Act relating to navigation of vessels, bills of lading, and certain obligations, duties, and rights in connection with the carriage of property"—the "Harter Act," so-called—approved February 13th, 1893, and Carrier shall have all rights and benefits granted to ship owner or carrier by all provisions of all sections of said Revised Statutes and all Acts of the said Congress and all Statutes or laws of any State or place where claim hereon may be asserted, limiting or permitting a limitation of a ship-owner's or carrier's liability, together with the benefit of all laws of Mexico or Central American Republics, further limiting or permitting a limitation of such liability.

13. If the owner of the vessel shall have exercised due diligence to make said vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from fault or negligence or error of judgment or mistake of pilot, engineer or crew in the navigation or management of the vessel, or from latent or other defect, or unseaworthiness of the vessel, whether existing at the time of the shipment or at the beginning of the voyage, or during the voyage, but not discoverable by due diligence, the consignees or owners of the cargo shall not be exempted from liability for contribution in General Average both to vessel as well as to cargo, or for any special charges incurred, but, with the vessel owner shall contribute in General Average, and shall pay any such special charges as if such danger, damage or disaster had not resulted from such fault, negligence, error, latent or other defects, or unseaworthiness. Passengers' effects, if any, not to contribute in General Average, but claims for passengers' effects sacrificed to be allowed in General Average, less their proper contribution in such case. General Average payable according to York-Antwerp Rules of 1890, OR OTHERWISE, as CARRIER interested shall elect.

14. The carrier, charterer, agent and/or owner of the vessel shall not be required to exercise due diligence to make the vessel seaworthy at the time of shipment, commencement of the voyage, or on the voyage, and if such due diligence has been used to make the vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, owner, agents, charterers nor the carrier shall become or be held responsible for damage or loss resulting from unseaworthiness, explosions, bursting of boilers, breakage of shafts, machinery or appurtenances, latent defects in the hull, machinery, boilers, rigging, gear, appurtenances, equipment or appliances, or from any other causes of what kind whatsoever.

| FREIGHT | | | |
|---|---|---|---|
| 150 | CU. FT. AT 2/6 | PER TON | 60— |
| | CU. FT. AT | PER TON | |
| | LBS. AT | PER 2000 | |
| | LBS. AT | PER 2000 | |
| | BD. FT. AT | PER 1000 | |
| | AT | | |
| | *Freight* | $ | |
| Wharfage & handling | | | $ 81 |
| | *Total* | | |

IN WITNESS WHEREOF, the Agent of said STEAMER hath signed ..... BILLS OF LADING, one of which Bills of Lading being accomplished the others to stand void. And the Shipper has also signed this Bill of Lading.

Dated at Tacoma this 23 day of May 1917

For C. HENRY SMITH, INC., Agents.

All of the provisions above and on the REVERSE SIDE of this BILL OF LADING are hereby agreed to on the part of the SHIPPER

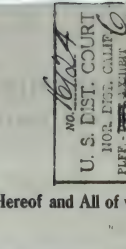
Mohns Commercial Company
per A.Kaltenbach. Shipper.

Read Conditions of Special Contract on the Reverse Side Before Signing.

Shippers must sign in full in ink, or if rubber stamp is used the name of the individual signing on behalf of the Shipper must be in ink.

AS TO RATES AND/OR MEASUREMENTS SUBJECT TO CORRECTION

as to Bill of Mayo 27/17 - as to Certificate




# Stipulations and Conditions for Cases Hereof and All of which are Agreed to by the Shipper

19. It is agreed, that if said packages be hereon consigned otherwise than "to Order" or "to Order of Shipper" that this instrument, whether Receipt or Bill of Lading, shall not be negotiable nor carrier required to secure a surrender hereof as a condition of delivery to consignee hereon named, and that when consigned "to Order" or "to Order of Shipper," the name of the party at place of delivery to be notified of arrival shall be given by Shipper and be written hereon. If any of said packages contain dangerous or inflammable or explosive material the shipper and consignee shall each be liable to Carrier for all loss and damage resulting therefrom and Carrier or its ship master may destroy any such package without liability therefor.

16. C. Henry Smith, Inc., reserves the right, in the event of any trouble arising between the Company and any of the Central American Republics, to store the cargo at the risk and expense of owner, shipper and/or consignee until such time as it may be convenient to carry same forward for delivery.

17. Manifest of goods must be furnished one day before ship's departure. Fines imposed on steamers in any Mexican port, on account of such manifest not being furnished in due time, or errors or omissions therein to be paid by the consignee of goods. The expense of stamped paper and other Customs House charges for landing and delivering goods at port of destination must be paid by the consignee thereof. Shippers will sign this Bill of Lading as such in the order right hand margin.

19. Carrier shall not be or be held liable for any loss of or from or damage to any of said packages that shall result from any of the following causes, to-wit, acts of enemies, civil commotions, thieves, robbers, arrest or restraint of princes or rulers or people, attachments, acts, or takings, or claims or restraints of government or municipal or de facto officers whether acting with or without lawful authority, riots, strikes, stop page of labor, stoppage in transit or claim of right thereto, fire or water on wharf or land or after or fire before loaded or after unloaded from vessel, or collapse of or destruction of or damage to wharf or pier or its coverings, nor if ship owner shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied shall Carrier be liable for any loss or damage that shall result in whole or in part from any or all of the following causes, to-wit, perils of the sea or other waters, fire on board vessel, barratry of master or crew, larceny of master or crew, rising of passengers, present or future latent defects, whether existing at time of shipment or at the beginning of the voyage, or breakage or fracture of machinery, boilers, propellers, shafts, bearings, valves, pipes, machinery or appurtenances or from explosion, bursting of boilers, collision with vessel or other structure or object, spontaneous heating or ignition, fumigation, fault or error in navigation of vessel, fault or error in management of vessel or of its master, winches, tackles, ropes, chains, slings, hooks, breakage of valves, cocks, pipes, tanks and their connections and this whether such fault or error be before or after sailing or be prior to the voyage or during the voyage, provided due diligence shall not be presumed, but the same must if claimed or alleged be proven by shipper.

20. Carrier shall not be or be held liable for leakage or wastage of contents of any package or for breakage of or damage to any package or package contents unless first show that such package was of proper strength and in good condition, and that such contents were properly packed and in good order when delivered to Carrier and that the package was, while in possession of Carrier, so crushed or broken as to cause said loss or damage and in no other way. Carrier shall not be liable for any such contents not specified herein, nor for loss from package or damage to property subject to thirsts, rusting, decay, dampness, change in color or flavor, contact or in part of glass, crockery, queensware, porcelain, bottles, pictures, picture frames, statuary or other castings, nor for breakage of packages not cased, decay or deterioration of perishable property, stains to packages, contact or mixture therewith from other Carrier freight, effects of chafing, pressure, climate, heat, cold, sweat, rust, vermin, twisting or bending of metals shipped as or in bales, or from any cause resulting from any burning or explosion of cargo, or from inaccuracy or omission of, proving weights or description of packages, contents or mixture thereof, except that such loss or damage was caused by or resulted from Carrier's neglect or fault or failure to exercise due diligence, storage, and/or handling of goods after arrival hereof. Each package shall be by shipper legibly marked with full address of consignee and if not so marked Carrier's agent at either private sale may act as agent for and for account of owner and apply proceeds in payment of freight and all other charges, and if sum so realized be not sufficient to pay all charges or make good such default, the shipper shall, on demand, pay all such charges or make good such deficiency as the case may be and any package not so marked or any package of perishable property when in his opinion same would become decayed or worthless before it could be delivered as herein provided, or refused by consignee on account of delay freight thereon and all charges shall be paid by shipper.

22. No said packages shall be vended by consignee at vessel's tackle immediately on her arrival at her said place of delivery without regard to weather; if consignee be not on hand to receive packages at vessel's tackle immediately after discharge by lighterman or wharfinger or other party or person believed by Carrier to be entitled thereto and who shall take charge of said packages, or the same may be kept on board or be landed on wharf or beach or bank or other place at risk of consignee, and at owner's risk and expense.

23. Any person who signs this bill of lading as accepting the terms thereof was authorized by the shipper to sign same for the shipper. Carrier shall never be liable for any loss of or damage to said packages for any delay in delivery caused in connection therewith unless its negligence or wilful default be shown to have been the sole cause of the same and if liability for loss or damage or for delay causing loss it shall ipso facto be subrogated to and have the benefit of all insurance procured upon said packages. Delivery of packages to the consignee or person in general order for discharge immediately ship be entered at custom house.

24. All claims of shipper against Carrier or its vessels or the masters thereof for any loss of or damage to or conversion of or mis-delivery of or delay in delivery of said packages shall be made in writing to Carrier or its Agent within sixty days from date of notice of any such loss, damage, etc., and if not so made and suit thereon be not instituted at any port in Distress or earliest newspaper mention of loss or stranding of such vessel on voyage shall be and for the date of such arrival at such port in which suit may be presented within said sixty days, such claim shall be and by every court be held to have been released by shipper and by consignee and all persons and that no such claim so presented or to recover for any such loss or damage, etc., shall be maintainable and such claim be so presented and suit be instituted and summons be served on Carrier within sixty days from and after the day and date that such claim be so presented and not after. Carrier shall be entitled to demand and grant further time for the commencement of such suit the same may be commenced within the time so granted therefor. Delivery of packages to the consignee or person in general order for discharge immediately ship be entered at custom house.

24. All claims of shipper against Carrier or its vessels or the masters thereof for any loss of or damage to or conversion of or mis-delivery of or delay in delivery of said packages shall be made in writing to Carrier or its Agent within sixty days from date of notice of any such loss, damage, etc., and if not so made and suit thereon be not instituted at any port in Distress or earliest newspaper mention of loss or stranding of such vessel on voyage shall be and for the date of such arrival at such port in which suit may be presented within said sixty days, such claim shall be and by every court be held to have been released by shipper and by consignee and all persons and that no such claim so presented or to recover for any such loss or damage, etc., shall be maintainable and such claim be so presented and suit be instituted and summons be served on Carrier within sixty days from and after the day and date that such claim be so presented and not after. Carrier shall be entitled to demand and grant further time for the commencement of such suit the same may be commenced within the time so granted therefor. Delivery of packages to the consignee or person in general order for discharge immediately ship be entered at custom house.

25. All claims of shipper against Carrier or its vessels or the masters thereof for any loss of or damage to or conversion of or mis-delivery of or delay in delivery of said packages shall be made in writing to Carrier or its Agent within sixty days from date of notice of any such loss, damage, etc., and if not so made and suit thereon be not instituted at any port in Distress or earliest newspaper mention of loss or stranding of such vessel on voyage shall be and for the date of such arrival at such port in which suit may be presented within said sixty days, such claim shall be and by every court be held to have been released by shipper and by consignee and all persons and that no such claim so presented or to recover for any such loss or damage, etc., shall be maintainable and such claim be so presented and suit be instituted and summons be served on Carrier within sixty days from and after the day and date that such claim be so presented and not after. Carrier shall be entitled to demand and grant further time for the commencement of such suit the same may be commenced within the time so granted therefor. Delivery of packages to the consignee or person in general order for discharge immediately ship be entered at custom house.

25. All liability for loss or damage to goods shall be determined by their invoice cost plus freight. It is expressly understood that the Steamship Company is not accepting the risk of theft, leakage, breakage, exposure, delay or loss from any cause, nor for loss or damage from effects of climate or decay, or caused by other cargo in same vessel, otherwise whose property Carrier shall not be responsible for loss or otherwise, nor from unavoidable detention or delay, and it is expressly agreed that the goods stated in this Bill of Lading are of the value of $100.00 or less per package, and unless a different or other value is expressly written and declared herein, liability of the Carrier, whether arising from its negligence or not, for any of the said goods from any cause, shall not exceed $100.00 per package, and in case of the total loss of or damage to any of said goods, the liability of the Carrier shall not exceed such proportion thereof per package as the loss or damage on each package bears to the sum of $100.00.

26. The shipper hereby represents and declares that the value of each package described on the face of this Bill of Lading does not exceed the sum of $100.00 unless the shipper shall expressly declare and there shall be written on the face hereof a different value and upon which a different rate of freight than is applied, rate of freight thereon is adjusted.

27. If steamer be disabled on voyage, Carrier may forward said packages to port of delivery by other conveyances at option of its ship master and shall receive additional compensation for such service when ordinary freight shall be paid by owners vessels or those of strangers; and if salvage services be rendered to shipper or said goods by steamer or vessel or vessels of Carrier, such service shall be as fully paid for as if rendered by strangers.

28. Carrier is not and shall not be required to deliver said packages at port of delivery at any particular time, or to meet any particular market or in time for any particular use; and shipper shall notify consignee or other person or forwarder or carrier at place of delivery to there receive packages as discharged at ship's tackle, and packages may be discharged immediately on arrival of vessel at port or anchorage or wharf or landing.

29. Carrier's vessels are not warranted seaworthy save in so far only as exercise of due diligence by Carrier in the premises of its agents and employees demand and shall attention to their duties and their selection and appointment of ship masters and officers and engineers and crew have secured or may secure it.

30. Carrier shall not be liable for any loss of or any damage by fire to any of said goods capable of being covered by insurance.

31. The shipper shall be liable for any loss or damage to steamer, cargo, lighter or wharf, caused by inflammable, explosive or dangerous goods, shipped without full disclosure of their nature, whether such shipper be principal or agent, and such goods may be thrown overboard or destroyed at any time without compensation. Lighter charges, if any, for discharging, lightering or other expenses on hazardous goods, declared or considered as such by civil or military authorities, must be borne by the shippers and consignees.

32. The steamer shall have a lien on the goods for all freight, primages or charges, and also for all fines or damages which the steamer or cargo may incur or suffer by reason of the illegal, incorrect or insufficient marking, numbering or addressing of packages or description of their contents. Invoices must be made out in accordance with the prescriptions and regulations of the Port, Customs or Consular authorities. Consular, Board of Health or other certificates required to accompany the goods are to be produced by shippers, and any detention, delay, charges or penalties incurred or occurring to steamer thereby owing to the want of such certificates, are to be borne by the shippers and/or consignees. Steamer or its owner will not be responsible for delay in their delivery or in the over carriage of goods not plainly marked with the port of destination, and the name and address of the consignee.

33. It is expressly stipulated that if said packages need to be lightered at any time at port of delivery, all lighterage services rendered shall be and be deemed to have been rendered by an independent carrier or person, if such services be procured by Carrier they shall be deemed to be and to have been so procured by it acting as agent therefor of shipper, and Carrier's liability as carrier at any port or place where such lighterage is needed, shall immediately terminate on actual delivery to said port or place. Carrier's liability after steamer be at anchor at or near to such port or place shall be that of warehouseman only, and said packages after unhooked from ship's tackles at such anchorage be at owner's risk.

34. Should in the opinion of the master, the weather or sea be such as to cause an unusual delay in the discharge of the whole or any part of the goods herein mentioned, the ship may proceed to any usual port of call, from whence the overcarried cargo be returned at the expense and risk of the consignee or consignees thereof, and the entry of the port of discharge or transhipment or communication therewith rendering or being liable to render the vessel liable to quarantine at such port, either from epidemic or otherwise, unless the master consider the entry of said port or any other port to which he may proceed for the delivery of the whole or any portion of the cargo intended voyage, the goods may be landed or put into a lazaretto, hulk, lighter or other receptacle at such port or any other available port and the master may consider safe, at shipper's risk and expense, and such discharge shall be proper and complete delivery and all liability of the steamer or carrier thereof shall absolutely cease. In the event of quarantine, the goods may be discharged on arrival at port of delivery at transhipment port, at the option of the master, in lighter vessel or receptacle necessary or proper for the ship's dispatch, at the consignee's risk and expense. The master may carry the goods to their destination in the same or other and then or tranship them, and advices mailed to the consignee, if named, shall be sufficient notice to consignee to be accepted as a due and complete delivery of said goods under this Bill of Lading, and such goods shall be liable and a lien thereon for all quarantine expenses incurred and all increased freight. Delivery is prevented by quarantine from reaching her destination, or making due delivery of the goods, all risk, liability of the Carrier therefor, as a carrier, without prejudice to notice to shipper, owner or consignee, discharged into depots, lazarettos, hulks, crafts or receptacles, or to the custody of quarantine officers or other persons, and such discharge shall be deemed a full and final delivery of the goods, all risk, liability and responsibility of the Carrier therefor, as a carrier, bailee, or otherwise, ending as soon as the goods are delivered from the ship's tackle, and all expenses incurred and all increased freight thereby occasioned shall be borne and paid by shipper, owner and consignee, all and any of them, the Carrier retaining a lien on the goods therefor and for all costs, charges and expenses incurred, and for all increased freight. Carrier's responsibility as to the original port of shipment to port of delivery shall be also then earned.

35. The terms hereunder includes stockholders and vessels and masters thereof; "packages" means all property mentioned or referred to on face hereof; "shippers" and "owners" and "consignees" and "owners of said packages and all pledgees thereof other than Carrier; "Owner's risk" and "O. R." mean that shippers have agreed that Carrier shall not be liable for any loss or damage unless it be shown to have entirely resulted from its negligence or wilful default.

36. Carrier's liability hereunder shall be several and shall end and its rights dependent upon delivery accrue immediately it has passed over the vessel's rail and freight be prepaid to carrier beyond said first mentioned place of delivery. Carrier shall be entitled to demand payment for payment of freight as may be in part so paid for other carrier's use; and freight of every carrier of said packages by water shall be due when said packages shall be taken on board other carrier's vessel and when said packages shall be laden on board other carrier's vessel and shall be payable by shipper and consignee to such other carrier, and said packages be likewise lost or not lost at any stage of entire transit;—no carrier shall be liable for delay or for damage or deterioration or loss or damage unless it be shown that same occurred while said packages were in its possession.

37. The rights and liabilities of all carriers by water shall be determined hereby; if Carrier deliver said packages to other carrier for carriage, such delivery shall be deemed a delivery to shipper, and not as carrier, and Carrier shall not be liable for any loss or damage thereto occurring while said packages are being carried by land, or by water, shipper agrees to be bound by the stipulations and conditions of the bills of lading issued by such other carrier so far as may be in force for such transfer or by such carrier for like transfer or carriage at place of such transfer.

38. Carrier shall have a lien on said property for all fines imposed on it and for all expense to it resulting from shipper's failure properly to mark, number, address or describe packages, and resulting from other errors or omissions of shippers, and all such fines and expenses shall be reimbursed to Carrier by shipper and be collectible hereunder from him.

39. All expense of cooperage and repairs of packages shall be paid by shipper.

40. The Carrier is hereby expressly granted the right and option of delivering the said packages hereinmentioned by this Bill of Lading to consignee direct, or out of landing and storing said merchandise either in lighters, hulks or wharf, or in warehouse or otherwise, at risk upon the arrival of said vessel at the usual place of said merchandise, without notice to and at the expense of consignee; and in the event of such landing and storing said merchandise, the Carrier shall be completely relieved from all further liability for loss or damage thereafter, whether arising from the negligence or other cause.

41. That merchandise on wharf or in warehouse awaiting shipment, transhipment or delivery shall be at owner's risk of loss or damage by fire, flood, and/or the giving away or falling or destruction in whole or in part of the warehouse, but only when such destruction arises through no fault or negligence of Carrier or representatives; and further, that the Carrier shall not be liable for merchandise on wharf or in warehouse for fire while upon the vessels, or before loading thereon or after unloading the same therefrom, unless such fire be caused by the default of the Carrier.

42. If the owner shall have exercised due diligence to make the steamer in all respects seaworthy, an to have her properly manned, equipped and supplied, it is accepted as hereby agreed that in case of damage, or delay resulting from fault or errors in navigation, or in the management of the steamer, or from any latent defect in the machinery, boilers or appurtenances, or from unseaworthiness of the vessel existing at the time of shipment or at the beginning of the voyage (provided the latent defect or unseaworthiness was not discoverable by the exercise of due diligence), the owner shall not be liable therefor, but the consignees or owners of the goods shall nevertheless, pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the ship owner in General Average to the payment of any sacrifices, losses or expenses of a General Average nature that may be made or incurred for the common benefit, or to relieve the adventure from any common peril, as though such loss, damage or delay had not been caused by such fault, danger, damage or disaster had not resulted from or been occasioned by faults or errors in navigation or in the management of the steamer, or any latent defect or unseaworthiness.

43. Also that in case any steamer of the Carriers under this Bill of Lading be famigated by the Clayton apparatus or otherwise, the ship owner shall not be liable for any loss or damage to the goods occasioned by such famigation.

The several carriers shall have a lien upon the goods specified in this Bill of Lading for all charges of freight and charges due to the same owners or consignees on other goods. In case of loss, detriment or damage to the goods, or delay in the transportation thereof, the carrier receiving same shall have the right to sell any perishable property they were at the time of such loss, damage, detriment or delay, shall alone be responsible therefor. The receipts of any carrier for the goods shall be prima facie evidence of the condition in which he received them in a suit against any other carrier.

44. In the event of any cargo being accepted and carried with freight charges to collect at destinations, and if through misdelivery of containers or any other cause whatsoever, such cargo or any part thereof is refused by the consignee carriers, and the Carrier receiving cargo in possession at the time of such refusal is compelled to return the same to the port of origin or otherwise dispose of the same, all freight and charges and all expenses of every and any description shall be immediately incurring in the reloading and/or discharge of said cargo, shall be a charge and lien upon said cargo and said cargo shall be delivered to owner said/or consignees, prior to taking delivery or effecting realignment of such cargo.

B/L No.

# SOUTH AMERICA PACIFIC LINE

## C. HENRY SMITH, INC., AGENTS

311 CALIFORNIA ST. - SAN FRANCISCO, U. S. A.

S. S. BAJA CALIFORNIA
SINALOA

## BILL OF LADING

S. S. REGULUS
GOVERNOR FORBES

S. S. "REGULUS" Voy. 2

SHIPPER: C. Henry Smith
San Francisco, Calif.

CONSIGNED TO (Mail Address - Not for purposes of Delivery):
Andes Exploration Co.
Valparaiso, Chile,

Port of discharge / Through rate to: Valparaiso, Chile,

RECEIVED from C. Henry Smith for shipment from Port Ludlow, Wash. by Steamer "Regulus" of C HENRY SMITH, INC., Agents, or any other of said Company's Steamers, or steamers employed by it, the following Merchandise, Marks, Numbers, Articles, Weights and/or Measurements as follows:

| MARKS | NO. PKGS. | DESCRIPTION OF ARTICLES | WEIGHT | CUBIC FEET |
|---|---|---|---|---|
| A E CO | 554 | Five Hundred Fifty-four Pieces containing Sixty Thousand, Five Hundred Eighteen (60,518) Feet Board Measure. | | |

COPY
NON-NEGOTIABLE

all in apparent good order, except When otherwise noted—the value, weight, quantity, quality, or condition of contents of said packages not being known to the Carriers.

**Delivery of Lumber to be taken at average rate of** _____ M ft, per day, and general cargo at average rate of not less than 500 tons per day or when less than 500 tons delivery to be taken on day of arrival, Sundays and holidays only excepted, failing which demurrage is to be paid at the rate of $1500.00 U. S. Gold per running day for S. S. REGULUS and $750.00 per running day for other steamers.

Should the steamer be fumigated by the Clayton apparatus or otherwise any damage resulting by such fumigation to goods shipped will not be accounted for by the owners or agents of the steamers of this line.

RATES AND/OR MEASUREMENTS SUBJECT TO CORRECTION

1. WHICH PACKAGES WERE RECEIVED AND ARE TO BE HELD AND CARRIED AND DELIVERED BY THE CARRIERS AND BY EACH SEVERAL SUCCEEDING CARRIERS, UPON THE EXPRESS AGREEMENT AND SUBJECT TO ALL THE STIPULATIONS AND CONDITIONS HEREON AND ON THE REVERSE SIDE HEREOF AND UNDER WHICH FREIGHT RATES ON SAID PACKAGES WERE ADJUSTED AND SAID PACKAGES RECEIVED FOR TRANSPORTATION AND TO ALL OF WHICH THE SHIPPER HAS AGREED AND HEREBY DOES AGREE, AND EVERY HOLDER HEREOF SHALL BE HELD BOUND THEREBY WHETHER THE SAME BE PRINTED OR WRITTEN.

2. The said packages are to be forwarded with such reasonable dispatch as the general business of the Carriers will permit, by Steamer or Steamers of C. HENRY SMITH, INC., Agents, upon and under the same agreement and subject to all of the said Stipulations and Conditions hereon, and ON THE REVERSE SIDE hereof, to the port of destination or so near thereto as safe navigation of such vessel or vessels shall then permit and with liberty to the Master of the vessel or vessels to sail without pilots, tow and assist vessels, deviate, and to lighter, surf, transship, land and reship said packages or any thereof, and to stop and to land and receive passengers and freight at other ports or places on or off the usual route and in any order), and there, at vessel's tackles, and in like condition to be delivered unto the consignee or his or their assigns or representatives, or if he or they be not on hand to so receive the same, or if said packages be destined beyond said port or place then to any lighterman or wharfinger or to any forwarder or other Carrier for and instead of the said named persons, consignee, assigns, corporation or representatives, and freight at tariff rates (unless otherwise agreed) and all charges advanced by Carriers and average shall be paid in full in U. S. Gold Coin on any such delivery, and full freight charges to be so paid on all damaged or unsound packages, and to secure payment of all such charges said packages are hereby pledged to Carrier.

3. Goods in refrigerator. Steamer shall not be accountable for the condition of goods shipped under this Bill of Lading nor for any loss or damage thereto arising from failure or breakdown of machinery, insulation or other appliances nor for detention, nor for the consequences of any act, neglect, default or error of judgment of the Master, Officers, Engineers, Crew or other persons in the service of the Owners, nor for any other cause whatsoever, and steamer shall be at liberty to jettison the whole or any part thereof if considered necessary for the common safety or for the purpose of decompostion.

4. In no event shall Carrier be liable for loss of or damage to any package, after it shall be unhooked from vessel's tackles

| FREIGHT | | | |
|---|---|---|---|
| | CU. FT. AT | PER TON | |
| | CU. FT. AT | PER TON | |
| | LBS. AT | PER 2000 | |
| | LBS. AT | PER 2000 | |
| 60518 | BD. FT. AT 32.00 | PER 1000 | 1936.58 |
| | AT | | |
| | *Freight* | *$* | |
| Loaded at Mills | | *Total* | $1936.58 |

it. It is also understood that if by fog, surf, bad weather or other causes, in the judgment of the commander, the Steamer be prevented from discharging cargo at said port of destination, the Steamer is to have the privilege to store the said goods at Ancon or any other port, or retain the same on board the Steamer, at the expense and risk of the owners, until such time as they can be delivered with safety at the place of destination or trans-shipment.

5. Freight payable in advance, in United States of America Gold Coin, at the rate as per margin, together with all charges incurred for storage, and other necessary expenses at port of delivery. Freight is payable on weight or measurement received or delivered, at Carrier's option.

7. All lighterage from Steamer to Steamer and/or between Steamer and shore of goods named in this Bill of Lading, shall be at the risk of owner, shipper or consignee.

8. Glass, crockery, or other articles contained in glass or crockery, or castings, or any article whatever of a fragile nature, taken only at risk of shipper, owner or consignee.

9. It is mutually agreed, that the liability of any carrier, as to goods destined beyond its own route, shall be terminated by proper delivery by him to the next succeeding carrier.

10. This Bill of Lading shall have the effect of a Special Contract not liable to be modified by a receipt from or any act of an intermediate carrier.

11. It shall be the duty of the Shipper, Consignee, Owner, or his Agent or repre sentative, to examine the said packages BEFORE REMOVAL by him to ascertain whether any part thereof shall be in a damaged condition or shall have been lost or shall be missing or not present for delivery to him; and BEFORE REMOVING the part thereof, he shall make said deliver in writing to the Steamer's Agent, a statement of any claim for any loss of or damage to or the absence of any part of said goods which could have been ascertained by him upon such examination before such removal of said goods; and a failure to make such examination and present such statement, shall be conclusive evidence in favor of the carrier that all of said packages were delivered in accordance with the conditions of the Bill of Lading and that there was not any loss or damage or absence of any part of such goods, which, if it had existed, could have been discovered upon making such examination before taking away or removal of said packages.

12. Liability of Carrier shall in no event be greater than that provided by Sections 4281, 4282 and 4283 of the Revised Statutes of the United States of America, and as Act of the Congress of said United States of America, entitled: "An Act relating to navigation of vessels, bills of lading, and certain obligations, duties, and rights in connection with the carriage of property"—the "Harter Act" so called—approved February 13th, 1893, and Carrier shall have all rights and benefits granted to ship owner or carrier by all provisions of all sections of said Revised Statutes and all Acts of Congress and all Statutes of any State or place where claim for damages may be asserted, limiting or permitting a limitation of a ship owner's or carrier's liability, together with the benefit of all laws of Mexico or Central American Republics, further limiting or permitting a limitation of such liability.

13. If the owner of the vessel shall have exercised due diligence to make said vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from fault or negligence or error of the pilot, master or crew in the navigation or management of the vessel, or from latent or other defect or unseaworthiness of the vessel, whether existing at the time of shipment or at the beginning of the voyage, or during the voyage, but not discoverable by due diligence, the consignees or owners of the cargo shall not be exempted from liability for contribution in General Average both to vessel as well as to cargo, on account of such general charges incurred, but with the vessel owner shall contribute in General Average, and shall pay any such special charges as if such danger, damage or disaster had not resulted from such fault, negligence, error, latent or other defects, or unseaworthiness. Passengers' effects, if any, not to contribute in General Average, but claims for passengers' effects admitted to be allowed in General Average, less their proper contribution in such case. General Average payable according to York-Antwerp Rules of 1890, OR OTHERWISE, as CARRIER interested shall elect

14. The carrier, charterer, agent and/or owner of the vessel shall only be required to exercise due diligence to make the vessel seaworthy at the time of shipment, commencement of the voyage, or on the voyage, and if such due diligence has been used to make the vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, owner, agents, charterer nor the carrier shall become or be held responsible for damage or loss resulting from unseaworthiness, explosions, bursting of boilers, breakage of shafts, machinery or appurtenance, latent defects in the hull, machinery, boilers, rigging, gear, appurtenances, equipments or appliances, or from any other causes of what kind whatsoever.

IN WITNESS WHEREOF, the Agent of said STEAMER hath signed one BILL OF LADING, one of which Bills of Lading being accomplished the others to stand void. And the Shipper has also signed this Bill of Lading.

Dated at Port Ludlow, Wash. 4th day of September, 17.

For C. HENRY SMITH, INC., Agents.

All of the provisions above and on the REVERSE SIDE of this BILL OF LADING are hereby agreed to on the part of the SHIPPER.

C. HENRY SMITH
BY _____ Shipper.

Read Conditions of Special Contract on the Reverse Side Before Signing.

Shippers must sign in full; no abbreviation is used the name of the individual signing on behalf of the Shipper must be in ink.

15. It is agreed, that if said packages be hereon consigned otherwise than "to Order" or "to Order of Shipper" that this instrument, whether Receipt or Bill of Lading, shall not be negotiable nor carrier required to secure a surrender hereof as a condition of delivery to consignee hereon named, and that when so consigned "to Order" or "to Order of Shipper," the name of the party at place of delivery to be notified of arrival shall be given by Shipper and be written hereon. If any of said packages contain dangerous or inflammable or explosive material the shipper and consignee shall each be liable to Carrier for all loss and damage resulting therefrom and Carrier or its ship master may destroy any such package without liability therefor.

16. C. Henry Smith, Inc., reserves the right, in the event of any trouble arising between the Company and any of the Central American Republics, to store the cargo at the risk and expense of owner, shipper and/or consignee until such time as it may be convenient to carry same forward for delivery.

17. Manifest of goods must be furnished one day before ship's departure. Fines imposed on Steamers in any Mexican port, on account of such manifest not being furnished in due time, or errors or omissions therein to be paid by the consignee of goods. The expense of stamped paper and other Custom House charges for landing and delivering goods at port of destination must be paid by the consignee thereof. Shippers will sign this Bill of Lading as such in the under right hand margin.

19. Carrier shall not be or be held liable for any loss of or from or damage to any of said packages that shall result from any of the following causes, to wit, acts of enemies, pirates, thieves, robbers, arrest or restraint of princes or rulers or people, attachments, acts or takings, or claims or restraints of government or municipal or de facto officers whether acting with or without lawful authority, riots, strikes, stoppage of labor, stoppage in transit or claim of right thereto, fire or water on wharf or land or pier or fire before loaded on or after unloaded from vessel, or collapse of or destruction of or damage to wharf or pier or its coverings, nor if ship owner shall have exercised due diligence to make the vessel on which said packages be shipped in all respects seaworthy, and properly manned, equipped and supplied shall Carrier be liable for any loss or damage that shall result in whole or in part from any or all of the following causes, to wit, perils of the sea or other waters, fire on board vessel, barratry of master or crew, larceny of master or crew, rising of passengers, present or future latent defects, whether existing at time of shipment or at the beginning of the voyage, in or breakage or fracture of hull, shaft, propeller, fittings or fixtures, valves, pipes, machinery or appurtenances or from explosion, bursting of boilers, collision with vessel or other structure or object, stranding, accident of navigation, fault or error in navigation of vessel, fault or error in management of vessel or of its engines, winches, hoisting gear, fittings, fixtures, ports, hatches, deadlights, valves, cocks, pipes, tanks and their connections and this whether such fault or error be before or after sailing or be in port or at sea; and any omission to exercise such due diligence shall not be presumed, but the same must if claimed or alleged be proven by shipper.

2[illegible] Carrier shall not be or be held liable for leakage or wastage of contents of any package, nor for breakage of or damage to contents of any package unless shipper first show that such package was of proper strength and in good condition, and that such contents were properly packed therein and in good order when delivered to Carrier and that the package was, while in possession of Carrier, so crushed or broken as to cause such loss or damage; and in no event be liable for loss of or damage to any such contents not specified herein, nor for loss from package or damage to property shipped in tierces, crates, sacks, bundles, bales or which shall consist in whole or in part of glass, crockery, queensware, porcelain, hollowware, pictures, picture frames, stoves or other castings, nor for breakage of castings not cased, decay or deterioration of perishable property, stains to packages, contagion or moisture received from such or other freight, effects of chafing, pressure, climate, heat, cold, sweat, rust, vermin, twisting or bending of metals shipped loose or in bundles, loss or damage resulting from any burning or explosion of cargo, or from inaccuracy or omission of proper marks or description, or from delay, unless it be first proven by shipper that such loss or damage was caused by or resulted from Carrier's neglect or fault or failure in proper loading, stowage, custody, care of proper delivery of said package. Each package shall be by shipper legibly marked with full address of consignee and if not so marked a delivery of full number of packages of like supposed contents without regard to quality or actual contents shall be a full discharge of Carrier's obligations hereunder and if any of said packages shall be delayed or go astray or be elsewhere landed because not properly marked or contents not properly described, Carrier shall not be liable therefor. Live stock, all perishable property, all live freight, and all property packed in second hand or weak cases, et cet., shall at all times be at owner's risk and neither fault nor failure nor improper loading nor bad stowage nor improper custody nor want of due care nor improper delivery of or by Carrier shall be presumed but same must if alleged be proven by shipper.

21. Advance charges shall be repaid to, and prepaid freight shall be retained by, Carrier whether vessel or property be lost or not lost at any stage of entire transit, and if all freight and charges due Carrier be not paid after arrival of vessel, Carrier may sell said packages at either public or private sale and as agent for and for account of owner and apply proceeds in payment of freight and all other charges, and if sum so realized be not sufficient to pay all such charges or if such sale be not made, the shipper shall, on demand, pay all such charges or make good such deficiency as the case may be, and ship master may at any time sell or dispose of perishable property when in his opinion same would become decayed or worthless before it could be delivered as herein provided, and if same be so sold or disposed of full freight thereon and all charges shall be paid by shipper.

22. The said packages shall be received by consignee at vessel's tackle immediately on her arrival at her said place of delivery without regard to weather; if consignee be not on hand to so receive packages as discharged, Carrier may deliver same to any lighterman or wharfinger or other party or person believed by Carrier to be responsible and who will take charge of said packages, or the same may be kept on board or be landed on wharf or beach or bank or stored in hulks or put in lighters for the owner and at owner's risk and expense.

23. The person who signed this bill of lading as accepting the terms thereof was authorized by the shipper to sign same for the shipper. Carrier shall never be liable for any loss of or damage to said packages nor for any damage or loss suffered in connection therewith unless its negligence or wilful default be shown to have been the sole cause of the same; and if Carrier become liable for any such damage or loss it shall ipso facto be subrogated to and have the benefit of all insurance procured upon said packages. Collectors of customs are hereby authorized to grant a general order for discharge immediately ship be entered at custom house.

24. All claims of shipper or consignee or other party in interest against Carrier or its vessels or the masters thereof for any loss of or damage to or conversion of or misdelivery of or delay in delivery of said packages or any thereof shall be in writing presented to Carrier or its Agent within sixty days from date of notice of any such loss or damage, etc., and arrival of vessel at port or place of delivery or at any port in distress or earliest newspaper mention of loss or stranding of such vessel on voyage shall each be and fix the date of such notice; and if any such claim be not so presented within said sixty days, such claim shall be and by every court be held to have been released by shipper and to be abandoned and barred; and no suit or any such claim so presented or to recover for any such loss or damage, etc., shall be maintained unless such claim be so presented and such suit be thereupon commenced and summons be served on Carrier within sixty days from and after the day and date that such claim be so presented, provided that if Carrier shall in writing expressly grant further time for the commencement of such suit the same may be commenced within the time so granted therefor; and every such suit not so commenced within said sixty days or within such further time so granted by Carrier shall be and by every court be held to be barred, and all claims and demands against Carrier, alleged by complaint therein shall be so held to have been released by shipper, owner and consignee, and to be abandoned and barred.

25. All liability for loss or damage to goods shall be determined by their invoice cost plus freight. It is expressly understood that the Steamship Company is not accountable for waste, leakage, breakage, insecure packages, chafage to goods in bales, nor for loss or damage from effects of climate or decay; or caused by other cargo in contact or otherwise when properly stowed; nor for explosion of articles on freight or otherwise, nor from unavoidable detention or delay, and it is expressly agreed that the goods named in this Bill of Lading are hereby valued at not exceeding $100.00 per package, and unless a different or other value is expressly written and declared herein, the liability of the Companies therefor, in case of the total loss of all or any of the said goods from any cause, shall not exceed $100.00 per package, and in case of the partial loss of or damage to any of said goods, the liability of the Carriers shall not exceed such proportion thereof per package as the loss or damage on each package shall bear to the sum of $100.00.

26. The shipper hereby represents and declares that the value of each package described on the face of this Bill of Lading does not exceed the sum of $100.00; unless the shipper shall expressly declare and there shall be written on the face hereof a different value; and upon such basis of valuation of said packages, the rate of freight thereon is adjusted.

27. If steamer be disabled on voyage, Carrier may forward said packages to port of delivery by other conveyances at option of its ship master and shall receive additional compensation for such service when rendered and whether performed by its own vessels or those of strangers; and if salvage services be rendered to shipper or said packages by servants or vessel or vessels of Carrier, such service shall be as fully paid for as if rendered by strangers.

28. Carrier is not and shall not be required to deliver said packages at port of delivery at any particular time or to meet any particular market or in time for any particular use; and shipper shall notify consignee or other person or forwarder or carrier at place of delivery to there receive packages as discharged at ship's tackles, and packages may be discharged immediately on arrival of vessel at port or anchorage or wharf or landing.

20. Carrier's vessels are not warranted seaworthy save in so far only as exercise of due care by Carrier in the selection of its agents and superintendents and their attention to their duties and their selection and appointment of ship masters and officers and engineers and crew have secured or may secure it.

80. Carrier shall not be liable for any loss of or any damage by fire to any of said goods capable of being covered by insurance.

31. The shipper shall be liable for any loss or damage to steamer, cargo, lighter or wharf, caused by inflammable, explosive or dangerous goods, shipped without full disclosure of their nature, whether such shipper be principal or agent; and such goods may be thrown overboard or destroyed at any time without compensation. Extra charges, if any, for discharging, lighterage or other expenses on hazardous goods, declared or considered as such by civil or military authorities, must be borne by the shippers and/or consignees.

32. The steamer shall have a lien on the goods for all freight, primages or charges, and also for all fines or damages which the steamer or cargo may incur or suffer by reason of the illegal, incorrect or insufficient marking, numbering or addressing of packages or description of their contents. Invoices must be made out in accordance with the prescriptions and regulations of the Port, Customs or Consular authorities. Consular, Board of Health or other certificates required to accompany the goods are to be produced by shippers, and any detention, delay, charges or penalties incurred or occurring to cargo or steamer, owing to the want of such certificates, are to be borne by the shippers and/or consignees. Steamer or its owner will not be responsible for delay in the delivery or in [illegible] of goods not plainly marked with the port of destination, [illegible] name and address of the consignee.

33. It is expressly stipulated that if said packages need to be lightered at any time or port or place, all lighterage services rendered shall be and be deemed to have been rendered by an independent carrier or person; if such services be procured by Carrier they shall be deemed to be and to have been so procured by it acting as agent thereof of shipper, and Carrier's liability as carrier at any port or place where such lighterage be needed, shall end immediately vessel be anchored at or near to said port or place. Carrier's liability after steamer be at anchorage at or near to said port of delivery shall be that of watchman only, and said packages after unhooked from ship's tackles at such anchorage be at owner's risk.

34. Should, in the opinion of the master, the weather or sea be such as to cause an unusual delay in the discharge of the whole or any part of the goods herein mentioned, the ship may proceed to her next regular port of call, from whence the overcarried cargo be returned at the expense and risk of shipper, owner or consignee. In case the entry of the port of discharge or transhipment or communication therewith rendering or being liable to render the vessel liable to quarantine at any subsequent port, or in case of the master considering the entry of said port or any port, either from epidemic or otherwise, unsafe or injurious to the further prosecution of the steamer's intended voyage, the goods may be landed or put into a lazaretto, hulk, lighter or other receptacle therefor, at such or any other available port the master may consider safe, at shipper's risk and expense, and such discharge shall be proper, final delivery and all liability of the steamer or carrier hereunder shall absolutely cease. In the event of quarantine, the goods may be discharged on arrival at port of delivery or transhipment into quarantine depot, hulk, lighter, or other vessel or receptacle necessary or proper for the ship's dispatch, at the consignee's risk and expense, or the master may carry the goods to the nearest convenient port and there land them or tranship them, and advices mailed to the consignee, if named, otherwise to shippers, shall be deemed, under this agreement, a due and complete delivery of said goods under this Bill of Lading, and such goods shall be liable and a lien thereon be held for all quarantine expenses incurred in consequence. If the ship is prevented by quarantine from reaching her destination, or making due delivery of the goods, or is detained at quarantine, the goods may be forthwith, without previous notice to shipper, owner or consignee, discharged into depots, lazarettos, hulks, crafts or lighters, at the risk and expense of shipper, owner and consignee, all and any of them, and such discharge shall be deemed a full and final delivery of the goods, all risk, responsibility and expenses of the Carrier therefor, as carrier, bailee, or otherwise, ending as soon as the goods are delivered from the ship's tackle, and all expenses thereby or thereafter incurred and all increased cost of such delivery shall be paid by shipper, owner and consignee, all and any of them, the Carrier retaining a lien on the goods therefor, but should the vessel or goods not be admitted, or such discharge be impracticable, or so in the master's opinion, the Carrier may forthwith without previous notice proceed to the nearest safe port, or at the ship's option to the nearest safe port to which the ship is bound, at the risk and expense of shipper, owner and consignee, all and any of them, and there land the goods, as if at the original port of discharge, at the risk and expense of shipper, owner and consignee, all and any of them, he, and they paying freight from the original port of discharge, and the Carrier retaining a lien on the goods therefor and for all costs, charges and expenses incurred, and for all increased cost of delivery. Carrier's freight from original point or port of shipment to port of delivery shall be also then earned.

35. "Carrier" includes stockholders and vessels and masters thereof; "packages" means all property mentioned or referred to on face hereof; "shippers" and "owners" mean shipper and all owners of said packages and all pledges thereof other than Carrier; "Owner's risk" and "O. R." mean that shippers have agreed that Carrier shall not be liable for any loss or damage unless it be shown to have entirely resulted from its negligence or wilful default.

86. Carrier's liability hereunder shall be several and shall end and its rights dependent on delivery accrue immediately it has made delivery as above provided, and if freight be prepaid to carrier beyond said first mentioned place of delivery, Carrier shall be shipper's agent for payment to other carrier of such freight as may be so paid for other carrier's use; and freight of every carrier of said packages by water other than C. Henry Smith, Inc., shall, at option of such carrier, be deemed earned when said packages shall be laden on board other carrier's vessel and shall be payable by shipper whether such other carrier's vessel or said packages be thereafter lost or not lost at any stage of entire transit;—no carrier shall be liable for delay or misdelivery or conversion or loss or damage unless it be shown that same occurred while said packages were in its possession.

37. The rights and liabilities of all carriers by water shall be determined hereby; if Carrier deliver said packages to other carrier for carriage, such delivery shall be made as shipper's agent, and not as carrier, and if such delivery be to any carrier by land, or by water, shipper agrees to be bound by the stipulations and conditions of such transfer receipt, shipping receipt, or bill of lading as may be in use for such transfer or by such carrier for like transfer or carriage at place of such transfer.

38. Carrier shall have a lien on said property for all fines imposed on it and for all expense to it resulting from shipper's failure to furnish proper Consular or Custom House papers in due time or resulting from other errors or omissions of shippers, and all such fines and expenses shall be reimbursed to Carrier by consignee before said property shall be delivered to him.

39. All expense of cooperage and repairs of packages shall be paid by shipper.

10. The Carrier is hereby expressly granted the right and option of delivering the merchandise represented by this Bill of Lading to consignee from alongside, or of landing and storing said merchandise either in lighters, hulks or wharf, or in warehouse immediately, upon the arrival of said steamer at the port of discharge of said merchandise, without notice to and at the expense of consignee; and in the event of its so landing and storing said merchandise, such Carrier is thereupon hereby released from all further liability for loss or damage thereafter, whether arising from fire or from any other cause.

41. That merchandise on wharf or in warehouse awaiting shipment, transhipment or delivery shall be at owner's risk of loss or damage by fire, flood, and/or the giving away or falling or destruction in whole or in part of the warehouse or the wharf; or any structure thereon, not happening through the fault or negligence of Carrier or representative; and further, that the Carrier shall not be liable for destruction of or damage to goods by fire while upon its vessels, or before loading thereon or after unloading the same therefrom, unless such fire is caused by the design or neglect of the Carrier.

42. If the owner shall have exercised due diligence to make the steamer in all respects seaworthy, and to have her properly manned, equipped and supplied, it is hereby agreed that, in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the steamer, or from any latent defect in the steamer, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent defect or unseaworthiness was not discovered or discoverable by the exercise of due diligence), the owner shall not be liable therefor, but the consignees or owners of the cargo shall, nevertheless, pay salvage, and any special charges incurred in respect of the cargo, and shall contribute with the ship owner in General Average to the payment of any sacrifices, losses or expenses of a General Average nature that may be made or incurred for the common benefit, or to relieve the adventure from any common peril, all with the same force and effect, and to the same extent, as if such danger, damage or disaster had not resulted from or been occasioned by faults or errors in navigation or in the management of the vessel, or any latent defect or unseaworthiness.

43. Also that in case any steamer of the Carriers under this Bill of Lading be fumigated by the Clayton apparatus or otherwise, the ship owner shall not be liable for any loss, damage or deterioration resulting from such fumigation.

The several carriers shall have a lien upon the goods specified in this Bill of Lading for all arrearages of freight and charges due by the same owners or consignees on other goods. In case of loss, detriment or damage to the goods, or delay in the transportation thereof, imposing any liability hereunder, the carrier in whose actual custody they were at the time of such loss, damage, detriment or delay, shall alone be responsible therefor. The receipt of any carrier for the goods shall be prima facie evidence of the condition in which he received them in a suit against any other carrier.

44. In the event of any cargo being accepted and carried with freight charges to collect at destination, and if through insufficiency of containers or any other cause whatsoever, such cargo or any part thereof is refused by the connecting carriers, and the Carrier having such cargo in possession at the time of such refusal is compelled to return the same to the port of origin or otherwise dispose of the same, all freight and other charges and all expense of every nature whatever, that may be reasonably incurring in the rehandling and/or discharge of said cargo, shall be a charge and lien upon and against said cargo, payable by the shipper, owner and/or consignee, prior to taking delivery or effecting reshipment of such cargo.

B/L No. 2

# SOUTH AMERICA PACIFIC LINE

## C. HENRY SMITH, INC., AGENTS

311 CALIFORNIA ST. - SAN FRANCISCO, U. S. A.

S. S. BAJA CALIFORNIA SINALOA

S. S. REGULUS GOVERNOR FORBES

## BILL OF LADING

S. S. "REGULUS" Voy. 2

SHIPPER: C. Henry Smith, San Francisco, Calif.

CONSIGNED TO (Mail Address - Not for purposes of Delivery): Braden Copper Co. Valparaiso, Chile.

Port of discharge / Through rate to: Valparaiso, Chile.

RECEIVED from C. Henry Smith for shipment from Port Ludlow, Wash. by Steamer "Regulus" of C. HENRY SMITH, INC., Agents, or any other of said Company's Steamers, or Steamers employed by it, the following Merchandise, Marks, Numbers, Articles, Weights and/or Measurements as follows:

COPY NON-NEGOTIABLE

| MARKS | NO. PKGS. | DESCRIPTION OF ARTICLES | WEIGHT | CUBIC FEET |
|---|---|---|---|---|
| | | -: UNDER DECK :- | | |
| B/H | 26,904 | Twenty-six Thousand, Nine Hundred Four Pieces Rough Lumber said to contain Five Hundred Thirty-seven Thousand, Six Hundred Ninety-seven (537,697) Feet Board Measure. | | |
| | | -: ON DECK :- | | |
| | 9,701 | Nine Thousand, Seven Hundred One Pieces Rough Lumber said to contain Two Hundred Thirteen Thousand, Six Hundred Fifty-three (213,653) Feet Board Measure. | | |

all in apparent good order, except when otherwise noted—the value, weight, quantity, quality, or condition of contents of said packages not being known to the Carriers.

**Delivery of Lumber to be taken at average rate of**
M ft. per day, and general cargo at average rate of not less than 800 tons per day or when less than 800 tons delivery to be taken on day of arrival, Sundays and holidays only excepted, failing which demurrage is to be paid at the rate of $1500.00 U. S. Gold per running day for S. S. REGULUS and $750.00 per running day for other steamers.

Should the steamer be fumigated by the Clayton apparatus or otherwise any damage resulting by such fumigation to goods shipped will not be accounted for by the owners or agents of the steamers of this line.

RATES AND/OR MEASUREMENTS SUBJECT TO CORRECTION

1. WHICH PACKAGES WERE RECEIVED AND ARE TO BE HELD AND CARRIED AND DELIVERED BY THE CARRIERS AND BY EACH SEVERAL SUCCEEDING CARRIERS, UPON THE EXPRESS AGREEMENT AND SUBJECT TO ALL THE STIPULATIONS AND CONDITIONS HEREON AND ON THE REVERSE SIDE HEREOF AND UNDER WHICH FREIGHT RATES ON SAID PACKAGES WERE ADJUSTED AND SAID PACKAGES RECEIVED FOR TRANSPORTATION, AND TO ALL OF WHICH THE SHIPPER HAS AGREED AND HEREBY DOES AGREE, AND EVERY HOLDER HEREOF SHALL BE HELD BOUND THEREBY WHETHER THE SAME BE PRINTED OR WRITTEN.

2. The said packages are to be forwarded with reasonable dispatch as the general business of the Carriers will permit, by Steamer or Steamers of C. HENRY SMITH, INC., Agents, upon and under the same agreement and subject to all of the said Stipulations and Conditions hereon, and ON THE REVERSE SIDE hereof, to the port of destination or so near thereto as safe navigation of such vessel or vessels shall then permit (but with option to the Master of the vessel or vessels to sail without pilots, tow and assist vessels, deviate, and to lighter, surf, transship, land and reship said packages or any thereof, and to stop and to land and receive passengers and freight at other ports or places on or off the usual route and in any order), and there, at vessel's tackles, and to like condition to be delivered unto the consignee or his or their assigns or representatives, or if he or they be not on hand to so receive the same, or if said packages be destined beyond said port or places then to any lighterman or wharfinger or to any forwarder or other Carrier for and instead of the said named person, company, assigns, corporation or representatives; and freight at tariff rates (unless otherwise agreed) and all charges aforesaid by Carriers and average shall be paid in full in U. S. Gold Coin on any such delivery, and full freight charges to be so paid on all damaged or unsound packages, and to secure payment of all such charges said packages are hereby pledged to Carrier.

3. Goods in refrigerator Steamer shall not be accountable for the condition of goods shipped under this Bill of Lading nor for any loss or damage thereto arising from failure or breakdown of machinery, insulation or other appliances nor for detention, nor for the consequences of any act, neglect, default or error of judgment of the Master, Officers, Engineers, Crew or other persons in the service of the Owners, nor for any other cause whatsoever, and steamer shall be at liberty to jettison the whole or any part thereof if considered necessary on account of decomposition.

4. In no event shall Carrier be liable for loss of or damage to any package, after it shall be unhooked from vessel's tackles.

5. It is also understood that if by fog, surf, bad weather or other causes, in the judgment of the commander, the Steamer be prevented from discharging cargo at said ports of destination, the Steamer is to have the privilege to store the said goods at Arena or any other port, or retain the same on board the Steamer, at the expense and risk of the owners, until such time as they can be delivered with safety at the place of destination or trans-shipment.

6. Freight payable in advance, in United States of America Gold Coin, at the rate as per margin, together with all charges incurred for storage, and other necessary expenses at port of delivery. Freight is payable on Weight or measurement received or delivered, at Carrier's option.

7. All Breakage from Steamer to Steamer and/or between Steamer and shore of goods named in this Bill of Lading, shall be at the risk of owner, shipper or consignee.

8. Glass, crockery or other articles contained in glass or crockery, or Castings, or any article whatever of a fragile nature, taken only at risk of shipper, owner or consignee.

9. It is mutually agreed, that the liability of any carrier, as to goods destined beyond its own route, shall be terminated by proper delivery by him to the next succeeding carrier.

10. This Bill of Lading shall have the effect of a Special Contract not liable to be modified by a receipt from or any act of an intermediate carrier.

11. It shall be the duty of the Shipper, Consignee, Owner, or his Agent or representative, to examine the said packages BEFORE REMOVAL by him to ascertain whether any part thereof shall be in a damaged condition or shall have been lost or shall be missing or not present for delivery to him, and BEFORE REMOVING any part thereof, he shall make and deliver in writing to the Steamer's Agent, a statement of any claim for any loss of or damage to or the absence of any part of said goods which could have been ascertained by him upon such examination before such removal of said goods, and a failure to make such examination and present such statement, shall be conclusive evidence in favor of the carriers that all of said packages were delivered in accordance with the conditions of this Bill of Lading and that there was not any loss or damage or absence of any part of such goods, which, if it had existed, could have been discovered upon making such examination before taking away or removal of said packages.

12. Liability of Carrier shall in no event be greater than that provided by Sections 4281, 4282 and 4283 of the Revised Statutes of the United States of America, and an Act of the Congress of said United States of America, entitled: "An Act relating to navigation of vessels, bills of lading, and certain obligations, duties, and rights in connection with the carriage of property"—the "Harter Act" so-called—approved February 13th, 1893, and Carrier shall have all rights and benefits granted to ship and owner by any provisions of all sections of said Revised Statute and all acts of the said Congress and all Statutes or laws of any State or place where claim hereon may be asserted, limiting or permitting a limitation of a ship-owner's or carrier's liability, together with the benefit of all laws of Mexico or Central American Republics, further limiting or permitting a limitation of such liability.

13. If the owner of the vessel shall have exercised due diligence to make said vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from fault or negligence or error of judgment of pilot, master or crew in the navigation or management of vessel, or from latent or other defect, or unseaworthiness of the vessel, whether existing at the time of shipment or at the beginning of the voyage, or during the voyage, but not discoverable by due diligence, the consignees or owners of the cargo shall not be exempted from liability for contribution in General Average both to vessel as well as to cargo, or for any special charges incurred, but, with the vessel owner shall contribute in General Average, and shall pay any such special charges as if such danger, damage or disaster had not resulted from such fault, negligence, error, latent or other defects, or unseaworthiness. Passengers' effects, if any, not to contribute in General Average, but claims for passengers' effects sacrificed to be allowed in General Average, less their proper contribution in such case. General Average payable according to York-Antwerp Rules of 1890, OR OTHERWISE, as CARRIER interested shall elect.

14. The carrier, charterer, agent and/or owner of the vessel shall only be required to exercise due diligence to make the vessel seaworthy at the time of shipment, commencement of the voyage, or on the voyage, and if such due diligence has been used to make the vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, owner, agents, charterers nor the carrier shall become or be held responsible for damage or loss resulting from unseaworthiness, explosions, bursting of boilers, breakage of shafts, machinery or appurtenance latent defects in the hull, machinery, boilers, rigging, gear, appurtenances, equipment or appliances, or from any other causes of what kind whatsoever.

IN WITNESS WHEREOF, the Agent of said STEAMER hath signed ..... BILLS OF LADING, one of which Bills of Lading being accomplished the others to stand void, and the Shipper has also signed this Bill of Lading.

Dated at Port Ludlow 4th day of September 17.

For C. HENRY SMITH, INC., Agents.

All of the provisions above and on the REVERSE SIDE of this BILL OF LADING are hereby agreed to on the part of the SHIPPER.

C. HENRY SMITH

By .....

Shipper.

Read Conditions of Special Contract on the Reverse Side Before Signing.

Shippers must sign in full in ink, or if rubber stamp is used the name of the individual signing on behalf of the Shipper must be in ink.

| FREIGHT | | | |
|---|---|---|---|
| | CU. FT. AT ____ PER TON | | |
| | CU. FT. AT ____ PER TON | | |
| | LBS. AT ____ PER 2000 | | |
| | LBS. AT ____ PER 2000 | | |
| [illegible] | BD. FT. AT 20.00 PER 1000 | [illegible] | |
| | AT ____ | | |
| | Freight $ | | |
| Loaded at Mills | Total | [illegible] | |

U. S. DIST. COURT
NOR. DIST. CALIF.
PLFF. EXHIBIT NO. 15124
Filed 6/11/19
Clerk

# Stipulations and Conditions Referred to on Face Hereof and All of which are Agreed to by Shipper

15. It is agreed, that if said packages be hereon consigned otherwise than ''to Order'' or ''to Order of Shipper'' that this instrument, whether Receipt or Bill of Lading, shall not be negotiable nor carrier required to secure a surrender hereof as a condition of delivery to consignee hereon named; and that when so consigned ''to Order'' or ''to Order of Shipper,'' the name of the party at place of delivery to be notified of arrival shall be given by Shipper and be written hereon. If any of said packages contain dangerous or inflammable or explosive material the shipper and consignee shall each be liable to Carrier for all loss and damage resulting therefrom and Carrier or its ship master may destroy any such package without liability therefor.

16 C. Henry Smith, Inc., reserves the right, in the event of any trouble arising between the Company and any of the Central American Republics, to store the cargo at the risk and expense of owner, shipper and/or consignee until such time as it may be convenient to carry same forward for delivery.

17. Manifest of goods must be furnished one day before ship's departure. Fines imposed on Steamers in any Mexican port, on account of such manifest not being furnished in due time, or errors or omissions therein to be paid by the consignee of goods. The expense of stamped paper and other Custom House charges for landing and delivering goods at port of destination must be paid by the consignee thereof Shippers will sign this Bill of Lading as such in the under right hand margin.

19. Carrier shall not be or be held liable for any loss of or from or damage to any of said packages that shall result from any of the following causes, to-wit, acts of enemies, pirates, thieves, robbers, arrest or restraint of princes or rulers or people, attachments, acts or takings, or claims or restraints of government or municipal or de facto officers whether acting with or without lawful authority, riots, strikes, stoppage of labor, stoppage in transit or claim of right thereto, fire or water on wharf or land or pier or fire before loaded on or after unloaded from vessel, or collapse of or destruction of or damage to wharf or pier or its coverings, nor if ship owner shall have exercised due diligence to make the vessel on which said packages be shipped in all respects seaworthy, and properly manned, equipped and supplied shall Carrier be liable for any loss or damage that shall result in whole or in part from any or all of the following causes, to-wit, perils of the sea or other waters, fire on board vessel, barratry of master or crew, larceny of master or crew, rising of passengers, present or future latent defects, whether existing at time of shipment or at the beginning of the voyage, in or breakage or fracture of hull, shaft, propeller, fittings or fixtures, valves, pipes, machinery or appurtenances or from explosion, bursting of boilers, collision with vessel or other structure or object, stranding, accident of navigation, fault or error in navigation of vessel, fault or error in management of vessel or of its engines, winches, hoisting gear, fittings, fixtures, ports, hatches, deadlights, valves, cocks, pipes, tanks and their connections and this whether such fault or error be before or after sailing or be in port or at sea; and any omission to exercise such due diligence shall not be presumed, but the same must if claimed or alleged be proven by shipper.

20. Carrier shall not be or be held liable for leakage or wastage of contents of any package nor for breakage of or damage to contents of any package unless shipper first show that such package was of proper strength and in good condition, and that such contents were properly packed therein and in good order when delivered to Carrier and that the package was, while in possession of Carrier, so crushed or broken as to cause such loss or damage; and in no event be liable for loss of or damage to any such contents not specified herein, nor for loss from package or damage to property shipped in tierces, crates, sacks, bundles, bales or which shall consist in whole or in part of glass, crockery, queensware, porcelain, hollowware, pictures, picture frames, stoves or other castings, nor for breakage of castings not cased, decay or deterioration of perishable property, stains to packages, contagion or moisture received from such or other freight, effects of chafing, pressure, climate, heat, cold, sweat, rust, vermin, twisting or bending of metals shipped loose or in bundles, loss or damage resulting from any burning or explosion of cargo, or from inaccuracy or omission of proper marks or description, or from delay, unless it be first proven by shipper that such loss or damage was caused by or resulted from Carrier's neglect or fault or failure in proper loading, stowage, custody, care of proper delivery of said packages. Each package shall be by shipper legibly marked with full address of consignee and if not so marked a delivery of full number of packages of like supposed contents without regard to quality or actual contents shall be a full discharge of Carrier's obligations hereunder and if any of said packages shall be delayed or go astray or bot elsewhere landed because not properly marked or contents not properly described, Carrier shall not be liable therefor. Live stock, all perishable property, all live freight, and all property packed in second-hand or weak cases, et cet., shall at all times be at owner's risk; and neither fault nor failure nor improper loading nor bad stowage nor improper custody nor want of due care nor improper delivery of or by Carrier shall be presumed but same must if alleged be proven by shipper.

21. Advance charges shall be repaid to, and prepaid freight shall be retained by, Carrier whether vessel or property be lost or not lost at any stage of entire transit, and if all freight and charges due Carrier be not paid after arrival of vessel, Carrier may sell said packages at either public or private sale and as agent for and for account of owner and apply proceeds in payment of freight and all other charges, and if sum so realized be not sufficient to pay all such charges or if such sale be not made, the shipper shall, on demand, pay all such charges or make good such deficiency as the case may be, and ship master may at any time sell or dispose of perishable property when in his opinion same would become decayed or worthless before it could be delivered as herein provided, and if same be so sold or disposed of full freight thereon and all charges shall be paid by shipper.

22. The said packages shall be received by consignee at vessel's tackle immediately on her arrival at her said place of delivery without regard to weather; if consignee be not on hand to so receive packages as discharged, Carrier may deliver same to any lighterman or wharfinger or other party or person believed by Carrier to be responsible and who will take charge of said packages, or the same may be kept on board or be landed on wharf or beach or bank or stored in hulks or put in lighters for the owner and at owner's risk and expense.

23. The person who signed this bill of lading as accepting the terms thereof was authorized by the shipper to sign same for the shipper. Carrier shall never be liable for any loss of or damage to said packages nor for any damage or loss suffered in connection therewith unless its negligence or wilful default be shown to have been the sole cause of the same; and if Carrier become liable for any such damage or loss it shall ipso facto be subrogated to and have the benefit of all insurance procured upon said packages.. Collectors of customs are hereby authorized to grant a general order for discharge immediately ship be entered at custom house.

24. All claims of shipper or consignee or other party in interest against Carrier or its vessels or the masters thereof for any loss of or damage to or conversion of or mis-delivery of or delay in delivery of said packages or any thereof shall be in writing presented to Carrier or its Agent within sixty days from date of notice of any such loss or damage, etc., and arrival of vessel at port or place of delivery or at any port in distress or earliest newspaper mention of loss or stranding of such vessel on voyage shall each be and fix the date of such notice; and if any such claim be not so presented within said sixty days, such claim shall be and by every court be held to have been released by shipper and to be abandoned and barred; and no suit or any such claim so presented or to recover for any such loss or damage, etc., shall be maintained unless such claim be so presented and such suit be thereupon commenced and summons be served on Carrier within sixty days from and after the day and date that such claim be so presented, provided that if Carrier shall in writing expressly grant further time for the commencement of such suit the same may be, commenced within the time so granted therefor; and every such suit not so commenced within said sixty days or within such further time so granted by Carrier shall be and by every court be held to be barred, and all claims and demands against Carrier, alleged by complaint therein shall be so held to have been released by shipper, owner and consignee, and to be abandoned and barred.

25. All liability for loss or damage to goods shall be determined by their invoice cost plus freight. It is expressly understood that the Steamship Company is not accountable for waste, leakage, breakage, insecure packages, chafage to goods in bales, nor for loss or damage from effects of climate or decay; or caused by other cargo in contact or otherwise when properly stowed; nor for explosion of articles on freight or otherwise, nor from unavoidable detention or delay, and it is expressly agreed that the goods named in this Bill of Lading are hereby valued at not exceeding $100.00 per package, and unless a different or other value is expressly written and declared herein, the liability of the Companies therefor, in case of the total loss of all or any of the said goods from any cause, shall not exceed $100.00 per package, and in case of the partial loss of or damage to any of said goods, the liability of the Carriers shall not exceed such proportion thereof per package as the loss or damage on each package shall bear to the sum of $100.00.

26. The shipper hereby represents and declares that the value of each package described on the face of this Bill of Lading does not exceed the sum of $100.00; unless the shipper shall expressly declare and there shall be written on the face hereof a different value; and upon such basis of valuation of said packages, the rate of freight thereon is adjusted.

27. If steamer be disabled on voyage, Carrier may forward said packages to port of delivery by other conveyances at option of its ship master and shall receive additional compensation for such service when rendered and whether performed by its own vessels or those of strangers; and if salvage services be rendered to shipper or said packages by servants or vessel or vessels of Carrier, such service shall be as fully paid for as if rendered by strangers.

28. Carrier is not and shall not be required to deliver said packages at port of delivery at any particular time or to meet any particular market or in time for any particular use; and shipper shall notify consignee or other person or forwarder or carrier at place of delivery to there receive packages as discharged at ship's tackles, and packages may be discharged immediately on arrival of vessel at port or anchorage or wharf or landing.

29. Carrier's vessels are not warranted seaworthy save in so far only as exercise of due care by Carrier in the selection of its agents and superintendents and their attention to their duties and their selection and appointment of ship masters and officers and engineers and crew have secured or may secure it.

30. Carrier shall not be liable for any loss of or any damage by fire to any of said goods capable of being covered by insurance.

31. The shipper shall be liable for any loss or damage to steamer, cargo, lighter or wharf, caused by inflammable, explosive or dangerous goods, shipped without full disclosure of their nature, whether such shipper be principal or agent; and such goods may be thrown overboard or destroyed at any time without compensation. Extra charges, if any, for discharging, lighterage or other expenses on hazardous goods, declared or considered as such by civil or military authorities, must be borne by the shippers and/or consignees.

32. The steamer shall have a lien on the goods for all freight, primages or charges, and also for all fines or damages which the steamer or cargo may incur or suffer by reason of the illegal, incorrect or insufficient marking, numbering or addressing of packages or description of their contents. Invoices must be made out in accordance with the prescriptions and regulations of the Port, Customs or Consular authorities. Consular, Board of Health or other certificates required to accompany the goods are to be produced by shippers, and any detention, delay, charges or penalties incurred or occurring to cargo or steamer, owing to the want of such certificates, are to be borne by the shippers and/or consignees. Steamer or its owner will not be responsible for delay in the delivery or in the over-carriage of goods not plainly marked with the port of destination, and the name and address of the consignee.

33. It is expressly stipulated that if said packages need to be lightered at any time or port or place, all lighterage services rendered shall be and be deemed to have been rendered by an independent carrier or person; if such services be procured by Carrier they shall be deemed to be and to have been so procured by it acting as agent therefor of shipper, and Carrier's liability as carrier at any port or place where such lighterage be needed, shall end immediately vessel be anchored at or near to said port or place. Carrier's liability after steamer be at anchor at or near to said port of delivery shall be that of warehouseman only, and said packages after unhooked from ship's tackles at such anchorage be at owner's risk.

34. Should, in the opinion of the master, the weather or sea be such as to cause an unusual delay in the discharge of the whole or any part of the goods herein mentioned, the ship may proceed to her next regular port of call, from whence the over-carried cargo be returned at the expense and risk of shipper, owner or consignee. In case the entry of the port of discharge or transhipment or communication therewith rendering or being liable to render the vessel liable to quarantine at any subsequent port, or in case of the master considering the entry of said port or any port, either from epidemic or otherwise, unsafe or injurious to the further prosecution of the steamer's intended voyage, the goods may be landed or put into a lazarette, hulk, lighter or other receptacle therefor, at such or any other available port the master may consider safe, at shipper's risk and expense, and such discharge shall be proper, final delivery and all liability of the steamer or carrier hereunder shall absolutely cease. In the event of quarantine, the goods may be discharged on arrival at port of delivery or transhipment into quarantine depot, hulk, lighter, or other vessel or receptacle necessary or proper for the ship's dispatch, at the consignee's risk and expense, or the master may carry the goods to the nearest convenient port and there land them or tranship them, and advices mailed to the consignee, if named, otherwise to shippers, shall be deemed, under this agreement, a due and complete delivery of said goods under this Bill of Lading, and such goods shall be liable and a lien thereon be held for all quarantine expenses incurred in consequence. If the ship is prevented by quarantine from reaching her destination, or making due delivery of the goods, or is detained at quarantine, the goods may be forthwith, without previous notice to shipper, owner or consignee, discharged into depots, lazarettes, hulks, crafts or lighters, at the risk and expense of shipper, owner and consignee, all and any of them, and such discharge shall be deemed a full and final delivery of the goods, all risk, responsibility and expenses of the Carrier therefor, as carrier, bailee, or otherwise, ending as soon as the goods are delivered from the ship's tackle, and all expenses thereby or threafter incurred and all increased cost of such delivery shall be paid by shipper, owner and consignee, all and any of them, the Carrier retaining a lien on the goods therefor; but should the vessel or goods not be admitted, or such discharge be impracticable, or so in the master's opinion, the Carrier may forthwith without previous notice proceed to the nearest safe port, or at the ship's option to the nearest safe port to which the ship is bound, at the risk and expense of shipper, owner and consignee, all and any of them, and there land the goods, as if at the original port of discharge, at the risk and expense of shipper, owner and consignee, all and any of them, he, and they paying freight from the original port of discharge, and the Carrier retaining a lien on the goods therefor and for all costs, charges and expenses incurred, and for all increased cost of delivery. Carrier's freight from original point or port of shipment to port of delivery shall be also then earned.

35 ''Carrier'' includes stockholders and vessels and masters thereof; ''packages'' means all property mentioned or referred to on face hereof; ''shippers'' and ''owners'' mean shipper and all owners of said packages and all pledges thereof other than Carrier; ''Owner's risk'' and ''O. R.'' mean that shippers have agreed that Carrier shall not be liable for any loss or damage unless it be shown to have entirely resulted from its negligence or wilful default.

36. Carrier's liability hereunder shall be several and shall end and its rights dependent on delivery accrue immediately it has made delivery as above provided; and if freight be prepaid to carrier beyond said first mentioned place of delivery. Carrier shall be shipper's agent for payment to other carrier of such freight as may be so paid for other carrier's use; and freight of every carrier of said packages by water other than C. Henry Smith, Inc., shall, at option of such carrier, be deemed earned when said packages shall be laden on board other carrier's vessel and shall be payable by shipper whether such other carrier's vessel or said packages be thereafter lost or not lost at any stage of entire transit;—no carrier shall be liable for delay or misdelivery or conversion or loss or damage unless it be shown that same occurred while said packages were in its possession.

37. The rights and liabilities of all carriers by water shall be determined hereby; if Carrier deliver said packages to other carrier for carriage, such delivery shall be made as shipper's agent, and not as carrier, and if such delivery be to any carrier by land, or by water, shipper agrees to be bound by the stipulations and conditions of such transfer receipt, shipping receipt, or bill of lading as may be in use for such transfer or by such carrier for like transfer or carriage at place of such transfer.

38. Carrier shall have a lien on said property for all fines imposed on it and for all expense to it resulting from shipper's failure to furnish proper Consular or Custom House papers in due time or resulting from other errors or omissions of shippers, and all such fines and expenses shall be reimbursed to Carrier by consignee before said property shall be delivered to him.

39. All expense of cooperage and repairs of packages shall be paid by shipper.

40. The Carrier is hereby expressly granted the right and option of delivering the merchandise represented by this Bill of Lading to consignee from alongside, or of landing and storing said merchandise either in lighters, hulks or wharf, or in warehouse immediately, upon the arrival of said steamer at the port of discharge of said merchandise, without notice to and at the expense of consignee; and in the event of its so landing and storing said merchandise, such Carrier is thereupon hereby released from all further liability for loss or damage thereafter, whether arising from fire or from any other cause.

41. That merchandise on wharf or in warehouse awaiting shipment, transhipment or delivery shall be at owner's risk of loss or damage by fire, flood, and/or the giving away or falling or destruction in whole or in part of the warehouse or the wharf; or any structure thereon, not happening through the fault or negligence of Carrier or representative; and further, that the Carrier shall not be liable for destruction of or damage to goods by fire while upon its vessels, or before loading thereon or after unloading the same therefrom, unless such fire is caused by the design or neglect of the Carrier.

42. If the owner shall have exercised due diligence to make the steamer in all respects seaworthy, and to have her properly manned, equipped and supplied, it is hereby agreed that, in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the steamer, or from any latent defect in the steamer, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent defect or unseaworthiness was not discovered or discoverable by the exercise of due diligence), the owner shall not be liable therefor, but the consignees or owners of the cargo shall, nevertheless, pay salvage, and any special charges incurred in respect of the cargo, and shall contribute with the ship owner in General Average to the payment of any sacrifices, losses or expenses of a General Average nature that may be made or incurred for the common benefit, or to relieve the adventure from any common peril, all with the same force and effect, and to the same extent, as if such danger, damage or disaster had not resulted from or been occasioned by faults or errors in navigation or in the management of the vessel, or any latent defect or unseaworthiness.

43. Also that in case any steamer of the Carriers under this Bill of Lading be fumigated by the Clayton apparatus or otherwise, the ship owner shall not be liable for any loss, damage or deterioration resulting from such fumigation.

The several carriers shall have a lien upon the goods specified in this Bill of Lading for all arrearages of freight and charges due by the same owners or consignees on other goods. In case of loss, detriment or damage to the goods, or delay in the transportation thereof, imposing any liability hereunder, the carrier in whose actual custody they were at the time of such loss, damage, detriment or delay, shall alone be responsible therefor. The receipt of any carrier for the goods shall be prima facie evidence of the condition in which he received them in a suit against any other carrier.

44. In the event of any cargo being accepted and carried with freight charges to collect at destination, and if through insufficiency of containers or any other cause whatsoever, such cargo or any part thereof is refused by the connecting carriers, and the Carrier having such cargo in possession at the time of such refusal is compelled to return the same to the port of origin or otherwise dispose of the same, all freight and other charges and all expense of every nature whatever, that may be reasonably incurring in the rehandling and/or discharge of said cargo, shall be a charge and lien upon and against said cargo, payable by the shipper, owner and/or consignee, prior to taking delivery or effecting reshipment of such cargo.

B/L No.

# SOUTH AMERICA PACIFIC LINE

## C. HENRY SMITH, INC., AGENTS

311 CALIFORNIA ST. - SAN FRANCISCO, U. S. A.

S. S. BAJA CALIFORNIA
SINALOA

## BILL OF LADING

S. S. REGULUS
GOVERNOR FORBES

S. S. "REGULUS" Voy. 2

SHIPPER

C. Henry Smith
San Francisco,
Calif.

CONSIGNED TO (Mail Address - Not for purposes of Delivery)

Order/Sst. Jorge D. Payet y Cia
Arica, Chile, in transit
to Bolivia

Port of discharge
Through rate to } Arica, Chile, in transit to Bolivia,

RECEIVED from C. Henry Smith for shipment from Port Ludlow, Wash., by Steamer "Regulus" of C. HENRY SMITH, INC., Agents, or any other of said Company's Steamers, or Steamers employed by it, the following Merchandise, Marks, Numbers, Articles, Weights and/or Measurements as follows:

| MARKS | NO. PKGS. | DESCRIPTION OF ARTICLES | WEIGHT | CUBIC FEET |
|---|---|---|---|---|
| | 1,279 | -: UNDERDECK :- One Thousand, Two Hundred Seventy-nine Pieces Rough Lumber said to contain Thirty Thouse-d, Thirteen (30,013) Feet Board Measure. | | |
| H/M | 7,448 | -: ON DECK :- Seven Thousand, Four Hundred Forty Pieces Rough Lumber said to contain One Hundred Forty Thousand Five Hundred Eighty-six (140,586) Feet Board Measure. | | |
| | 302 | Three Hundred Two Bundles containing One Thousand, Eight Hundred Twelve (1812) Pieces Dressed Lumber said to contain Eight Thousand, Six Hundred Forty-two (8,642) Feet Board Measure. | | |

COPY
NON-NEGOTIABLE

all in apparent good order, except when otherwise noted—the value, weight, quantity, quality, or condition of contents of said packages not being known to the Carriers.

Delivery of Lumber to be taken at average rate of ..... M ft. per day, and general cargo at average rate of not less than 500 tons per day or when less than 500 tons delivery to be taken on day of arrival, Sundays and holidays only excepted, failing which demurrage is to be paid at the rate of $1500.00 U. S. Gold per running day for S.S. REGULUS and $750.00 per running day for other steamers.

Should the steamer be fumigated by the Clayton apparatus or otherwise any damage resulting by such fumigation to goods shipped will not be accounted for by the owners or agents of the steamers of this line.

1. WHICH PACKAGES WERE RECEIVED AND ARE TO BE HELD AND CARRIED AND DELIVERED BY THE CARRIERS AND BY EACH SEVERAL SUCCEEDING CARRIERS, UPON THE EXPRESS AGREEMENT AND SUBJECT TO ALL THE STIPULATIONS AND CONDITIONS HEREON AND ON THE REVERSE SIDE HEREOF AND UNDER WHICH FREIGHT RATES ON SAID PACKAGES WERE ADJUSTED AND SAID PACKAGES RECEIVED FOR TRANSPORTATION AND TO ALL OF WHICH THE SHIPPER HAS AGREED AND HEREBY DOES AGREE AND EVERY HOLDER HEREOF SHALL BE HELD BOUND THEREBY WHETHER THE SAME BE PRINTED OR WRITTEN.

2. The said packages are to be forwarded with such reasonable dispatch as the several business of the Carriers will permit, by Steamer or Steamers of C. HENRY SMITH, INC., Agents, upon and under the same agreement and subject to all of the said Stipulations and Conditions herein, and ON THE REVERSE SIDE hereof to the port of destination or so near thereto as safe navigation of such vessel or vessels shall then permit (but with option to the Master of the vessel or vessels to sail without pilots, tow and assist vessels, deviate, and to lighter, surf, transship, land and reship said packages or any thereof, and to put and to land and receive other passengers and freight at other ports or places on or off the usual route and in any order), and there, at vessel's tackles, and in like condition to be delivered unto the consignee or his or their assigns or representatives, or if he or they be not on hand to so receive the same, or if said packages be destined beyond such port or place then to any lighterman or wharfinger or to any forwarder or other Carrier for and [illegible] of the said named person, company, assignee, corporation or representatives, and freight at tariff rates (unless otherwise agreed) and all charges advanced by Carriers and Agents shall be paid in full in U. S. Gold Coin on such delivery, and full freight charges to be so paid on all damaged or unsound packages; and to secure payment of all such charges said packages are hereby pledged to Carrier.

3. Goods in refrigerator. Steamer shall not be accountable for the condition of goods shipped under this Bill of Lading nor for any loss or damage thereto arising from failure or breakdown of machinery or refrigerating or other appliances or from ice, or from the consequences of any act, neglect, default, or error in judgment of the Master, Officers, Engineers, Crew or other persons in the service of the vessel, or any other cause whatsoever, and steamer shall be at liberty to jettison the whole or any part thereof if considered necessary on account of decomposition.

4. In no event shall Carrier be liable for loss of or damage to any package, after it shall be unhooked from vessel's tackles.

5. It is also understood that if by fog, surf, bad weather or other causes, in the judgment of the commander, the Steamer be prevented entering the discharging ports at said port of destination, the Steamer is to have the privilege to store the said goods at Ancon or any other port, or retain the same on board the Steamer at the expense and risk of the owners, until such time as they can be delivered with safety at the place of destination or trans-shipment.

6. Freight payable in advance, in United States of America Gold Coin, at the rate as per margin, together with all charges incurred for storage, and other necessary expenses at port of delivery. Freight is payable on weight or measurement received or delivered, at Carrier's option.

7. All lighterage from Steamer to Steamer and/or between Steamer and shore of goods named in this Bill of Lading, shall be at the risk of owner, shipper or consignee.

8. Glass, crockery, or other articles contained in glass or crockery, or Castings, or any article whatever of a fragile nature, taken only at risk of shipper, owner or consignee.

9. It is mutually agreed, that the liability of any carrier, as to goods destined beyond its own route, shall be terminated by proper delivery by him to the next succeeding carrier.

10. This Bill of Lading shall have the effect of a Special Contract not liable to be modified by a receipt from or any act of an intermediate carrier.

11. It shall be the duty of the Shipper, Consignee, Owner, or his Agent or representative, to examine the said packages BEFORE REMOVAL by him to ascertain whether any part thereof shall be in a damaged condition or shall have been lost or shall be missing or not present for delivery to him; and BEFORE REMOVING any part thereof, he shall make said deliver in writing to the Steamer's Agent, a statement of any claim for any loss of or damage to or the absence of any part of said goods which could have been ascertained by such examination before such removal of said goods; and a failure to make such examination and present such statement, shall be conclusive evidence in favor of the carriers that all of said packages were delivered in accordance with the conditions of this Bill of Lading and that there was not any loss or damage or absence of any part of said goods, which, if it had existed, could have been discovered upon making such examination before taking away or removal of said packages.

12. Liability of Carrier shall in no event be greater than that provided by Sections 4281, 4282 and 4283 of the Revised Statutes of the United States of America, and an Act of the Congress of said United States of America, entitled "An act relating to navigation of vessels, bills of lading, and certain obligations, duties, and rights in connection with the carriage of property," approved February 13th, 1893, and Carrier shall have all rights and benefits granted to ship owner or carrier by all provisions of all sections of said Revised Statutes and all Acts of the said Congress and all Statutes or laws of any State or place where claim herein may be asserted, limiting the liability of owners of a steamer of a ship owner or carrier's liability, and for the benefit of all laws of Mexico or Central American Republics, further limiting or permitting a limitation of such liability.

13. If the owner of the vessel shall have exercised due diligence to make said vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from fault or negligence of error in the navigation or management of the vessel, or from latent or other defect, or unseworthiness of the vessel, whether existing at the time of sailing or at the beginning of the voyage, or during the voyage, but not discoverable by due diligence, the consignees or owners of the cargo shall not be exempted from liability for contribution in General Average both to vessel as well as to cargo, or for any special charges incurred, but, with the vessel owner shall contribute in General Average, and shall pay any such special charges as if such danger, damage or disaster had not resulted from such fault, negligence, error, latent or other defects, or unseworthiness. Passengers' effects, if any, not to contribute in General Average, but claims for passengers' effects sacrificed to be allowed in General Average, less their proper contribution in such case. General Average payable according to York-Antwerp Rules of 1890, OR OTHERWISE, as CARRIER interested shall elect.

14. The owner, charterer, agent and/or owner of the vessel shall only be required to exercise due diligence to make the vessel seaworthy at the time of shipment, commencement of the voyage, or on the voyage, and due diligence shall only be used to make the vessel in all respects seaworthy and properly manned, equipped and supplied, and neither the vessel, owner, agents, charterers nor the carrier shall become or be held responsible for damage or loss resulting from unseaworthiness, explosions, bursting of boilers, breakage of shafts, machinery or appurtenances of defects in the hull, machinery, boilers, rigging, gear, appurtenances, equipment or appliances, or from any other causes of what kind whatsoever.

IN WITNESS WHEREOF, the Agent of said STEAMER hath signed 3 BILLS OF LADING, one of which Bills of Lading being accomplished the others to stand void. And the Shipper has also signed the Bill of Lading.

Dated at Port Ludlow, 4th day of September 19 17.

For C. HENRY SMITH, INC., Agents.

All of the provisions above and on the REVERSE SIDE of this BILL OF LADING are hereby agreed to on the part of the SHIPPER.

C. HENRY SMITH
BY
Shipper.

Read Conditions of Special Contract on the Reverse Side Before Signing.

Shippers must sign in full in ink, or if rubber stamp is used the name of the individual signing on behalf of the Shipper must be in ink.

RATES AND/OR MEASUREMENTS SUBJECT TO CORRECTION

FREIGHT

| | | | | |
|---|---|---|---|---|
| | | CU. FT. AT | PER TON | |
| | | CU. FT. AT | PER TON | |
| | | LBS. AT | PER 2000 | |
| 179861 | | LBS. AT 42.80 | PER 2000 | 7617. 75 |
| | | BD. FT. AT | PER 1000 | |
| | | AT | | |
| | | | Freight $ | |
| Loaded at Mills | | | Total | $ 7617.75 |

19

# Stipulations and Conditions Referred to on Face Hereof and All of which are Agreed to by Shipper

19. It is agreed, that if said packages be hereon consigned otherwise than "to Order" or "to Order of Shipper" that this instrument, whether Receipt or Bill of Lading, shall not be negotiable nor carrier required to secure a surrender hereof as a condition of delivery to consignee named, and that when consigned "to Order" or "to Order of Shipper," the name of the party at place of delivery to be notified of arrival shall be given by Shipper and be inserted herein. If any of said packages contain dangerous or inflammable or explosive material the shipper and consignee shall each be liable to Carrier and all other shippers for damages resulting thereto and Carrier or its ship master may destroy any such package without liability therefor.

18. O. Henry Smith, Inc., reserves the right, in the event of any trouble arising between the Company and any of the Central American Republics, to store the cargo at the risk and expense of owner, shipper and/or consignee until such time as it may be convenient to carry same forward for delivery.

17. Manifest of goods must be furnished one day before ship's departure. Fines imposed on Steamers in any Modern port because of any manifest not being furnished in due time, or errors or omissions therein to be paid by the consignees of goods. The expense of stamped papers and other Custom House charges for landing and delivering goods at port of destination must be paid by the consignee thereof. Shippers will sign this Bill of Lading as such in the under right hand margin.

19. Carrier shall not be or be held liable for any loss of or from or damage to any of said packages that shall result from any of the following causes, to-wit, acts of enemies, pirates, thieves, robbers, arrest or restraint of princes or rulers or people, attachments, acts or takings, or civilians or restraints of government or municipal or de facto officers whether civil or military, authorities, barratry, collision, explosion, barges of labor, stoppage in transit or claim of right thereto, fire or water on wharf or land or place or fire before loaded on or after unloaded from vessel or during or after the destruction of or damage to wharf or pier or its coverings, nor if ship owner shall have exercised due diligence to make the vessel in which shipped in all respects fit to all respects seaworthy, and properly manned, equipped and supplied shall Carrier be liable for any loss or damage that shall result in whole or in part from any or all of the following causes, to-wit, perils of the sea or other waters, fire on board vessel barratry of master or crew, inherent vice, master or crew, rising or pressure of water or future latent defects, whether existing at time of shipment or at the beginning of the voyage, in or breakage or fracture of hull, machinery, fittings or furnishings, valves, pipes, machinery or appurtenances or from explosion, bursting of boilers, collision with vessel or vessels, accidents to machinery, breakage, explosion, destruction, fault or error in navigation of vessel, fault or error in management of vessel or of its engines, winches, boilers, grates, furnaces, chimneys, machinery, pipes, valves, cocks, pipes, tanks and their connections and this whether such fault or error be before or after sailing or during the course of the voyage. And Carrier when it has been due diligence shall not be presumed, but the same must if claimed or alleged be proven by shipper.

20. Carrier shall not be or be held liable for leakage or wastage of contents of any package nor for breakage of any package unless caused by want of reasonable care in first show that such package was of proper strength and in good condition, and that such contents were properly packed and secured, and that such breakage occurred in Carrier and that the package was, while in possession of Carrier, so crushed or broken as to cause such loss or damage. Carrier is discharged from all liability in respect to any such contents not specified herein, nor for loss from package or damage to property shipped in tierces, crates, casks, bags, baskets, boxes, bales, cases, bundles, or in part of glass, crockery, queensware, porcelain, hollowware, pictures, picture frames, stoves or other castings, unless shipper shall have packed same so as to prevent deterioration of perishable property, stains to package, contagion or moisture received from exhaust or other freight, effects of changes in pressure, climate, heat, cold, weather, worms, vermin, twisting or bending of metals shipped loose or in bundles, loss or damage resulting from any breakage or leakage, unless shipper shall have packed same with use of proper marks or description, or from delay, unless it be first proven by shipper that such loss or damage was caused by negligence of Carrier, and not by reason of failure in proper loading, stowage, custody, care of proper delivery of said packages. Carrier shall not be liable for loss of or damage to any of said packages unless the same if not so marked a delivery of full number of packages of like supposed contents without notice and inability or actual refusal to deliver, and Carrier's liability for any such contents hereunder and if any of said packages shall be delayed or go astray or be elsewhere handled because not properly marked or addressed as hereinbefore provided, Carrier shall not be liable therefor. Live stock, all perishable property, all live freight, and all property packed in secondhand packages are carried entirely at the risk of the owner's risk; and neither fault nor failure nor improper loading nor bad stowage nor improper custody nor want of due care nor improper delivery of or by Carrier shall be presumed but same must if alleged be proven by shipper.

21. Advance charges shall be repaid to, and prepaid freight shall be retained by, Carrier whether vessel or property be lost or not after it shall have begun loading and if all freight and charges due Carrier be not paid after arrival of vessel, Carrier may sell said packages at either public or private sale and as agent for the owner account of owner and apply proceeds in payment of freight and all other charges, and if sum so realized be not sufficient to pay all of same, a lien shall be and is hereby made, the shipper shall, on demand, pay all such charges or make good such deficiency as the case may be, and this contract shall be held to cover any and all such liability property when in his opinion same would become decayed or worthless before it could be delivered as hereby agreed, and Carrier shall not be responsible for any freight thereon and all charges shall be paid by shipper.

22. The said packages shall be received by consignee at vessel's tackle immediately on her arrival at her said place of delivery without regard to weather; if consignee be not on hand to so receive packages as discharged, Carrier may deliver same to any lighterman or wharfinger or other party or person believed by Carrier to be responsible and who will take charge of said packages and consignee shall be liable for and to be landed on wharf or beach or bank or stored to hulks or put in lighters for the owner and at owner's risk and expense.

23. The person who signed this bill of lading as accepting the terms thereof was authorized by the shipper to sign same for the shipper. Carrier shall never be liable for loss of or damage to said packages or for any act, omission or default of Carrier in connection therewith unless its negligence or wilful default be shown to have been the sole cause of the same; and if Carrier shall be liable for any loss or damage or loss it shall ipso facto be subrogated to and have the benefit of all insurance procured upon said packages. Carrier is prevented and delayed in discharging vessel by "general order for discharge immediately ship be entered at custom house.

24. All claims of shipper consignee or other party against Carrier or its vessels or the masters thereof for any loss of or damage to or conversion of or misdelivery of or delay in delivering said packages or any of them shall be in writing presented to Carrier or its Agent within sixty days from date of notice of any such loss or damage, etc., and evidence of such claim shall be furnished at the port in distress or settled newspaper mention of loss or stranding of such vessel on voyage shall such be and be held to be sufficient notice of such claim, and if not so presented within said sixty days, such claim shall be and by every court be held to have been released by shipper and his assigns and consignee and no suit for any such claim so presented or to recover for any such loss or damage, etc., shall be maintained unless such claim be so presented and such suit be commenced and summons be served on Carrier within, sixty days from and after the day and date that such claim be so presented, and unless such suit be commenced and prosecute grant further time for the commencement of such suit the same may be commenced within the time so granted and summons be served on Carrier within the time so said sixty days or within such further time so granted by Carrier shall be and by every court be held to be barred, and all claims for such loss or damage shall be held by complaint therein shall be so held to have been released by shipper, owner and consignee, and to be abandoned and barred.

25. All liability for loss or damage to goods shall be determined by their invoice cost or freight. It is expressly understood that the Carrier shall not be liable or accountable for waste, leakage, breakage, insecure packages, chafage to goods in bales, nor for loss or damage from decay, effects of climate or other causes, or for any change in content or otherwise when properly stowed; nor for explosion of articles on freight or subsequent, nor from unavoidable perils of the sea, and it is agreed that value of the goods named in this Bill of Lading are hereby valued at not exceeding $100.00 per package, and unless a different or other value is expressly written and declared herein, the liability of the Companies therefor, in case of the total loss of all or any of said goods from any cause whatsoever $100.00 per package, and in case of the partial loss of or damage to any of said goods, the liability of the Carriers shall not exceed such proportion thereof per package as the loss or damage on each package shall bear to the sum of $100.00.

26. The shipper hereby represents and declares that the value of each package described on the face of this Bill of Lading does not exceed the sum of $100.00 unless the shipper shall expressly declare and there shall be written on the face hereof a different value; and upon such declaration being made the rates of freight thereon is adjusted.

27. If steamer be disabled on voyage, Carrier may forward said packages to port of delivery by other conveyances at option of its ship master and shall receive additional compensation for such services from shipper, consignee or owner, and by its own vessels or those of stevagors; and if salvage services be rendered to shipper or said packages by servants or vessels or vessels of Carrier such service shall be as fully paid for as if rendered by strangers.

28. Carrier is not and shall not be required to deliver said packages at port of delivery at any particular time or to meet any particular market or in time for any particular use; and shipper shall notify consignee or other person or forwarder or carrier at place of delivery to there receive packages as discharged at ship's tackles, and packages may be discharged immediately on arrival at vessel at port or anchorage or wharf or landing.

29. Carrier's vessels are not warranted seaworthy save in so far only as exercise of due care by Carrier in the selection of its agents and superintendents and their attention to their duties and their selection and appointment of ship masters and officers and engineers and crew have secured or may secure it.

30. Carrier shall not be liable for any loss of or any damage by fire to any of said goods capable of being covered by insurance.

31. The shipper shall be liable for any loss or damage to steamer, cargo, lighter or wharf caused by inflammable, explosive or dangerous goods, shipped without full disclosure of their nature, whether such shipper be principal or agent; and such goods may be thrown overboard or destroyed at any time without compensation. And charges if any, for discharging, lightering or otherwise exposure on hazardous goods, declared or considered as such by civil or military authorities, must be borne by the shippers and/or consignees.

32. The steamer shall have a lien on the goods for all freight, primages or charges, and also for all fines or damages which the steamer or cargo may incur or suffer by reason of the illegal, incorrect or insufficient marking, numbering or addressing of packages or description of their contents. Invoices must be made out in accordance with the prescriptions and regulations of the Port, Customs or Consular authorities. Consular, Board of Health or other certificates required to accompany the goods are to be produced by shippers, and any detention, delay, charges or penalties incurred or occurring to cargo or steamer, owing to the want of such certificates, are to be borne by the shippers and/or consignees. Steamer or its owner will not be responsible for delay in the delivery or in the non-delivery of goods not plainly marked with the port of destination, and the name and address of the consignee.

33. It is expressly stipulated that if said packages need to be lightered at any time or port or place, all lighterage or services rendered shall be and be deemed to have been rendered by an independent carrier or person, if such services be procured by Carrier they shall be deemed to be and to have been so procured by it acting as agent therefor of shipper, and Carrier's liability as carrier at any port or place where said packages may be landed shall be absolutely ended be ascertained at or near to said port or place. Carrier's liability after steamer be at anchor at or near to the steamer's wharf shall be that of warehouseman only for packages not after unhooked from ship's tackles at such anchorage be at owner's risk.

34. Should, in the opinion of the master, the weather or sea be such as to cause an unusual delay in the discharge of the whole or any part of the goods herein mentioned, the ship may proceed to her next regular port of call, there to discharge the said goods at the expense and risk of shipper, owner or consignee, the entry of the port of discharge, and the subsequent discharge thereof, rendering or being liable to render the vessel liable to quarantine at any subsequent port, in case of the master consulting with the port authorities of any such port, either from epidemic or otherwise, unsafe or injurious to the further prosecution of the voyage, and the goods are intended by or belong to him, or are his private, bulk, lighter or other receptacle therefor, at such or any other available port or place, whether named in the order, as shipper's risk and expense, and all liability of the steamer or carrier hereunder shall be proper, final delivery and all liability of the steamer or carrier hereunder shall cease. In the event of quarantine, the goods may be discharged on arrival at port of delivery or transhipment into quarantine depot, hulk, lighter, or other vessel or receptacle necessary or proper for the purpose, at the owner's risk and expense, or the master may carry the goods to the nearest convenient port and there discharge them, at the entry of the port of discharge, and the transhipment, otherwise to shippers, shall be deemed, under this agreement, a due and complete delivery of the goods hereunder, and the Bill of Lading, and the liability of the steamer or lien thereon be held for all quarantine expenses incurred in consequence. If the ship is prevented from discharging her cargo at the usual place of discharge by reason of the goods, or is detained at quarantine, the goods may be forthwith, without previous notice to the shipper, consignee or owner, discharged into quarantine depot, hulks, lighters, at the risk and expense of shipper, owner and consignee, all and any of them, and the goods shall be deemed to be delivered to shipper, and the goods shall rest, responsibility and expenses of the Carrier therefor, as carrier, bailee or otherwise, shall cease. And if the goods are delivered from the ship, all and any expenses thereby or thereafter incurred and all increased rent of such delivery shall be paid by shipper, consignee or owner or carriers, all and each of them. The carrier retaining a lien on the goods therefor, but should the vessel or goods not be admitted to pratique by the proper authorities, or the master, in the master's discretion, the carrier may forthwith without previous notice proceed to the nearest safe port, and the carrier shall have the option to discharge the goods there, which shall be done at the risk and expense of shipper, owner and consignee, all and any of them, and the goods shall be held by the carrier, on account of shipper, at such port, and the delivery of the goods there shall be a full delivery, and the original bill of lading or part of shipment to port of delivery shall be also then earned.

35. "Carrier" includes stockholders and vessels, and masters thereof; "packages" means all property mentioned or referred to on face hereof; "shippers" and "owners" means all owners of said packages; "Carrier" means all carriers other than Carrier; "Owner's risk" and "O. R." mean that shippers have agreed that Carrier shall not be liable to them for any loss or damage to said goods, however resulted from its negligence or wilful default.

36. Each and every subsidiary hereunder shall be several and shall end and its rights dependent on delivery accrue immediately it has made delivery as above provided; and Carrier's liability as carrier of said packages shall cease on delivery of same. Carrier shall be shipper's agent for payment to other carrier of such freight no may be so collected by other carrier's use; and freight of carrier and all charges of port of shipment to port of delivery shall be also then earned.

37. The rights and liabilities of all carriers by water shall be determined hereby; if Carrier deliver said packages to other carrier for carriage, such delivery shall be deemed shipper's agent, and not Carrier's agent, and shall in no way by any carrier by land, or by water, shipper agrees to be bound by the stipulations and conditions of shipper's receipt, contract, shipping receipt, or bill of lading as may be in use for such transfer or by such carrier for like transfer or carriage at places of such transfer.

38. Carrier shall have a lien upon said packages for all charges due it and for all expense to it resulting from shipper's failure to furnish proper Consular or Custom House papers, and for all fines or penalties imposed on account of omissions of shippers, and all such fines and expenses shall be reimbursed to Carrier by consignee before said property shall be delivered to him.

39. All expenses of cooperage and repairs of packages shall be paid by shipper.

40. The Carrier is hereby expressly granted the right and option of delivering the said packages consigned by Bill of Lading, Receipt or Order, without delivery, or of loading and storing said merchandise either in lighters, hulks or wharf, or in warehouses, at shipper's risk, upon the arrival of said vessel at the port of discharge of said merchandise, without notice to and at the expense of consignee; and in the event of the exercise of such option Carrier's liability as carrier for the property released from all further liability for loss or damage thereafter, whether arising from the act of Carrier or other cause.

41. That merchandise on wharf or in warehouses awaiting shipment, transhipment or delivery, or in transit by land or water, or in process of loading, storing, delivery or loading and storing said merchandise either in lighters, hulks or wharf, or in warehouses, at shipper's risk, upon the arrival of said vessel at the port of discharge of said merchandise, without notice to and at the expense of consignee; and in the event of the exercise of such option Carrier's liability as carrier for the property released from all further liability for loss or damage thereafter, whether arising from the act of Carrier or other cause.

41. That merchandise on wharf or in warehouses awaiting shipment, transhipment or delivery, or in transit by land or water, or in process of loading, storing, delivery or loading and storing said merchandise either in lighters, hulks or wharf, or in warehouses, at shipper's risk, upon the arrival of said vessel at the port of discharge of said merchandise, without notice to and at the expense of consignee; and in the event of the exercise of such option Carrier's liability as carrier for the property released from all further liability for loss or damage thereafter, whether arising from the act of Carrier or other cause.

42. If the owner shall have exercised due diligence to make the steamer in all respects seaworthy and to have her properly manned, equipped and supplied, it is hereby agreed that, in case of danger, damage or disaster resulting from any defect in the steamer, her machinery or appurtenances, or from the negligence of the master, engineer or crew or any latent defect in the hull, machinery or appurtenances, or in the equipment, or any concealed defect, or unseaworthiness not discovered or existing at the beginning of the voyage (provided the latent defect or unseaworthiness shall not be discovered or exist through want of due diligence owner shall not be liable therefor, but the consignees or owners of the cargo shall, nevertheless, be liable for any and all charges incurred in the preservation of the cargo, and shall contribute with the ship owner in General Average to the payment of such sacrifices, losses or expenses of a General Average nature that may be made or incurred for the common benefit, or to relieve the adventure from any common peril, as fully as if such sacrifices, losses or expenses of the same nature or such danger, damage or disaster had not resulted from or been occasioned by faults or errors in navigation or in the management of the steamer, or from latent defect or unseaworthiness.

43. Also that in case any steamer of the Carriers under this Bill of Lading be fumigated by the Clinton apparatus or otherwise, the ship owner shall not be liable for any damage to the cargo occasioned by the fumigation.

The several carriers shall have a lien upon the goods specified in this Bill of Lading for the payment of freight and charges due to the ship owner upon any other goods on other goods. In case of loss, detriment or damage to the goods, or delay in the transportation thereof, imposing any liability therefor upon the carrier in whose actual custody they were at the time of such loss, damage, detriment or delay, shall alone be responsible therefor. The receipt of any carrier for the goods shall be prima facie evidence of the condition in which he received them in a suit against any other carrier.

44. In the event of any cargo being accepted and carried with freight charges to collect at destination, and if through insufficiency of containers or any other cause whatsoever, such cargo or any part thereof is refused by the consuming carriers, and the Carrier having such cargo in possession at the time of such refusal is compelled to return the same to the port of origin or otherwise dispose of the same, all freight and other charges and all expenses of every nature whatever, that may be reasonably incurring in the rehandling and/or discharges of said cargo, shall be a charge and lien upon and against said cargo, payable by the shipper, owner and/or consignee, prior to taking delivery or effecting reshipment of such cargo.

(Defendant's Exhibit 4–S will be found on page 75 hereof.)

**Defendant's Exhibit No. 5–B.**

"PRIVATE.

"Kristiania, October 12th, 1917.

"C. Henry Smith, Esq.,

"San Francisco.

"Dear Sir,

"I refer to my letter of 4th inst. and have since received your cable of 5th, asking whether I would be disposed to sell my interests in the 'Pacific' and 'Baja' Company, which, however, I am not inclined to do at present, which I telegraphed you.

"I have also received your cable of 6th, sent via the Legation at Washington, reading thus:

> 'Regarding your cable to Hvoslef that I closed contract against instructions stop this is not correct stop refer my telegrams and your letter July twelfth,'

—to which I have had to reply as follows:

> 'Your telegram 6/10 stop you never replied to my cable 10/7 that contract fixed accordingly stop consequently my telegram to Hvoslef correct stop cabled Hvoslef again yesterday confer him.'

"When cabling, it is rather difficult to go into details, but I have now gone through our correspondence so many times that I find there can be no doubt about the fact that you did not cable me, in reply to my telegram of 10th July,x) that you had closed the contract. Put yourself in my place—what would you think if I did not cable you what I

(Testimony of John A. Bishop.)

was doing, when you might have been awaiting some important reply? The fact that you did not reply is *untilligible* to me. I really hope, for order's sake, that you will go through our letter correspondence, in which I have confirmed all the cables exchanged, and I cannot but think that you will then understand my position. Fancy, I received your letter of 24th July, in which you send me copy of the nitrate charter, about two months after it had been written. The letters, which I wrote you during that time, will clearly have shown you that I had no idea that you had fixed any new contract.

"Yours very truly,

"A. O. LINDVIG. [157—135]

x)

"P. S.—In case you had telegraphed me that you had closed with the reservation as mentioned in my cable of 10th July, the contract would have been in order."

On the inward voyage of the "Regulus" I shipped 1000 tons of coal belonging to me to the South.

Q. At the time you said you had shipped it $2 or $3 under the market rate.

A. I didn't say that positively. I could not recall. It is a matter of two years back.

Q. At any rate, on the date of the shipment the market rate was above the rate at which you had shipped it? A. That is correct. * * *

Mr. MOORE.—Now, what, if anything, did the

(Testimony of John A. Bishop.)

circumstance that this was the first voyage of the "Regulus" have to do with your going out and buying and shipping 1126 tons of coal on her?

A. Because the freight was very hard to get; was very scarce at that time; and I did not know when we would get the steamer from the shipping board. That was very indefinite, and then finally when the shipping board gave us permission to take the steamer they gave me only 21 days to load it and get it out of here. So that time was very essential to get the steamer away because I was very anxious. I thought that the shipping board might change its mind.

Q. Was or was not the agreement that you entered into with the Shipping Board dated March 30th, 1917, whereby they were to permit a transfer of this vessel to the Norwegian flag conditioned upon her starting on her first round trip voyage of three round voyages between here and Chile and South American, within 21 days after March 30th, 1917? A. Yes, sir. * * *

Q. Well, now, outside of those two items here, one shipment of gasoline by you and one shipment of cement, were there any other commodities that might be classified as general cargo shipped by you on any of these 26 voyages where somebody else was shipping the same commodity, leaving to one side the lumber now?

A. Yes, sir, there was the "Sinaloa" 9. That was apples.

Mr. MOORE.—He shipped 40 boxes of dried apples on the "Sinaloa" 9 at $27.50.

(Testimony of John A. Bishop.)

The COURT.—What date is that?

Mr. MOORE.—September, 1917.

A. Goetz Brothers shipped merchandise at $26.25.

Mr. MOORE.—Q. Goetz Brothers shipped merchandise at $26.25?

A. And another time shipped machinery at $27.50.

Mr. MOORE.—That would not be the same as apples, properly speaking. [158—136]

The COURT.—Apples are pretty good machinery for the stomach sometimes.

Mr. MOORE.—I was really referring to where somebody had shipped some commodity, not of the same classification.

A. I don't remember any case except this gasoline.

Mr. MOORE.—Except this gasoline we have spoken of, voyage 9, and the cement of the "Regulus," voyage 2? A. Yes, sir.

Q. Do you recall how many shipments of cement you made all told? A. Only one.

Q. You only shipped cement once on the whole 26 voyages? A. Yes, sir.

Q. Now, in respect to the lumber, I will ask you to look at "Regulus" voyage 1 and tell us what lumber you shipped there and to what place and what rates you paid?

A. I made one shipment to Arica.

Q. What rate did you pay? A. $30.

The COURT.—$30 a thousand or $30 a ton.

(Testimony of John A. Bishop.)

A. $30 a thousand feet board measure.

Mr. FRANK.—April, 1917. What port?

A. Arica.

Mr. MOORE.—It was this "Regulus" voyage 1.

Q. Now, will you state what other shipments of lumber were made on that vessel, and to what ports and at what rate?

A. One shipment by Thane & Company, $32, to Mejillones.

Q. Was Mejillones a regular port of call?

A. No.

Q. Was there any shipment of lumber made to a regular port of call on that voyage by anybody else?

A. Yes, sir. There was one by the Mohnes Commercial company to Callao.

Q. At what rate? A. $30.

Q. Now, take the "Baja California," voyage 6, and I will ask you to state whether you shipped any lumber on that voyage, and if so, to what port and at what rate. Is a rate to a port not a port of a regular call higher than the rate to the ports of regular calls? [159—137] A. Yes, sir.

Q. Well, she sailed March 6, 1916. "Baja California," voyage 6.

Do you care to look at these, or would I ask him the question?

Mr. FRANK.—All I want to do is to get the details in.

Mr. MOORE.—Q. Show him your shipment first, Mr. Smith. Now, I will ask you to state what ship-

(Testimony of John A. Bishop.)

ments of lumber, if any, was made by you on the "Baja California" voyage 6, sailing from here March 3d, 1916, to what port it was shipped by you and at what rate?

A. One shipment to Arica.

Q. At what rate? A. $20.

Q. Now, what other shipments of lumber were made on that same voyage, and to what port and at what rate?

A. To the Mohnes Commercial Company, $22. One shipment.

Q. And to what port?

A. Callao, one shipment at $20 for the same firm.

Q. And to the same port? A. The same port.

Q. One shipment?

A. One shipment for Grace & Company, the same port and the same rate.

Q. That is $20?

A. $20; another shipment for Grace & Company, the same port, $20. Then one shipment for Balfour-Guthrie for Talara Bay, $21.

Q. This shipment for Balfour-Guthrie at $21 to Talara Bay; is not Talara Bay an outside port of call? A. Yes, sir; it is.

Q. Now, I will ask you in respect to the "Baja California" voyage 10, whether or not you shipped any lumber on that voyage, and if so, where to, and at what rate?

A. One shipment to Antifogasta.

Q. At what rate? A. $30.

Q. Now, were there any other shipments?

(Testimony of John A. Bishop.)

Mr. FRANK.—Q. What date is that? That is "Baja California." What is the date of that?

A. May, 1917.

Mr. MOORE.—Q. Now, what other shipments of lumber, if any, were made on that voyage, and to what destination, and at what rate?

A. One to Callao by the Mohnes Commercial Company, $30. One more for the same firm, $30.

Q. You made one shipment to Antifogasta at $30 and they made two to Callao at thirty.

A. Yes, sir. [160—138]

Q. Now see if you made any shipment on the "Sinaloa," voyage 8, and if so, at what rate and to what port? A. One shipment to Arica.

Q. What rate? A. $30.

Q. Now, what other shipments of any lumber, if any were made on that voyages, and to what port and what rate?

Mr. FRANK.—Q. What is the date of that?

A. April, 1917. One shipment for the Mohnes Commercial Company, to Callac, $30.

Mr. MOORE.—Now, Mr. Smith do these two instances where you shipped the same commodity of general cargo for the same voyage as other shippers shipping that same identical commodity, and these four instances where you shipped lumber on the same voyages as other shippers also shipped lumber, comprise all of the occasions out of the 26 voyages when you happened to ship the same commodity on a given voyage when somebody else was shipping it also? A. Yes, sir.

(Testimony of John A. Bishop.)

Mr. MOORE.—I would like to invite your attention, your Honor, to this statement. It shows a shipment of lumber to the same port by Mr. Smith and other shippers throughout the period without a segregation as to the same voyages. These four instances already being given being the only ones on which it happened that he was shipping upon the same vessel as other shippers were.

The COURT.—He has already covered this.

Mr. MOORE.—There is only one feature of it. I want to ask him one question on it. This one shipment I wanted to invite his attention.

Q. You made a shipment of lumber upon the "Regulus" voyage 1. That is this first trip of the "Regulus" after she was transferred by the shipping board. You made a shipment upon the "Regulus," voyage 1—no, pardon me. It is the "Regulus" voyage 2. You made a shipment upon the "Regulus" voyage 2, September, 1917, to Valparaiso for $32 a thousand, did you not? A. Yes, sir.

Q. Well now, as a matter of fact, Mr. Smith, was that one shipment above or below what would have been the existing, going rate for new business or new lumber offered at the time of the sailing of that vessel?

Mr. FRANK.—What do you mean. Have you any destination?

Mr. MOORE.—No, no destination in my mind. I will put the question this way.

Q. Was that rate of $32 for lumber a thousand to Valparaiso above or below what would have been the

(Testimony of John A. Bishop.)

going market [161—139] rate on lumber at that time where business was freshly offered?

A. The going rate at that time was $32 plus 25 surcharges.

Q. Now, did that $32 include a surcharge?

A. No, I made one shipment that did not include the surcharge.

Q. Well, see if that is the shipment, that shipment to Valparaiso? A. Yes, sir.

Q. Now, I wish you would explain to the Court and jury how it is that that shipment of lumber to Valparaiso did not include the surcharge?

A. Well, this lumber was sold in April. The lumber was sold by me in the month of April.

The COURT.—Q. 1917?

A. 1917. And it was booked to go forwards on these steamers or on the "Regulus" voyage 2, June—July shipment. The contract is here of the booking.

Mr. MOORE.—That does not explain to me how the shipment did not take the surcharge?

A. Well, because it was booked before the surcharge went into effect, and it did not take the surcharge.

The COURT.—Q. What was this surcharge?

A. The surcharge was on account of the war rates.

Q. Imposed by the shipping board?

A. Imposed by the higher price for the voyage and other prices.

Mr. FRANK.—Just practically an increase in the rate, wasn't it? A. Yes.

(Testimony of John A. Bishop.)

The lumber shipment was sold to the Guggenheim interests. Before I sold it the Guggenheim interests had asked for competitive bids, and I was the lowest bidder. After they had purchased from me the Chilean Exploration Company (Guggenheim interests) were not interested in the space. They wanted to see out C. I. F. price; that means they wanted the stuff delivered in Chile, and I sold a cargo delivered at Chile. With my cargo on board the vessel was full, and that shut out other cargo that was offered.

The rate changed between the time I had assigned this space to myself and the time the vessel sailed from the port. [162—139] Arica is one of the regular ports of call, and Valparaiso is another. Arica is about 2,000 miles this side of Valparaiso.

The witness is then shown two bills of lading, one for Voyage 1 of the "Regulus," containing the coal shipment, and one for Voyage 2, containing the lumber shipment.

The material part of said bills of lading is the following:

Shipper, C. Henry Smith.

Consigned to the Andes Exploration Co., Valparaiso, Chile.

The amount shipped is 60,518 ft. B. M.

The rate allowed is $32.00,—$19,036.58.

Date of shipment, Port Ludlow, 4th September, 1917.

The other bill of lading is:

**Plaintiff's Exhibit No. 7.**

Shipper, C. Henry Smith.
Consigned to Braden Copper Co., Valparaiso, Chile.
The cargo carried was 751,350 board feet.
The rate, $32.00, or a total of $24,043.20
The date is, Port Ludlow, 4th September, 1917.
The total amount of that freight is $24,043.20.

(Plaintiff's Ex. 7.)

Q. Now, Mr. Smith, I show you another bill of lading on the same voyage, of the same vessel, and ask you if that is a shipment made by you?

A. Yes, sir.

(The bill of lading is offered in evidence.)

**Plaintiff's Exhibit No. 8.**

Shipper, C. Henry Smith, Consignee,
Order Not. Jorge D. Payot y Cia, Arica, Chile, in transit to Bolivia.
The port of discharge is Arica, Chile.
The amount shipped, 179,241 board feet.
The rate is $42.50.
The date is Port Ludlow, 4th September, 1917.
The total amount is $7,617.75

(Plaintiff's Exhibit 8.)

I was paying at least the market rate on that $42.50.

The witness is then asked to figure the difference between the $32 rate and the $42 rate on freight on the two cargoes, and says it is $8,524.61.

In the account "Governor Forbes" Voyage 3, to San Francisco, [163—140] September 14, 1917,

there is a charge of 7½% inward freight that means inward freight on the "Governor Forbes" $28,-637.73. The amount of the commission is $2,897.02.

The witness is asked to take those figures and tell us what the commission must have been on that freight at 5%, and replies that it would have been $1,931.89.

The difference between that and what I charged is $965.93.

The witness is then referred to the same account, the voyage No. 3 of the "Governor Forbes," September 14, 1917, and to the charges therein of 7½% coastwise freight, $2,562.88, commissions $192.27, and asked to figure out what this commission would amount to at 5% and deduct it from $192.27, and he says the difference is $64.08.

The attention of the witness is then called to the "Sinaloa" Voyage 7, Statement 14, dated San Francisco, February 1, 1917, and to the charge therein of 7½% on coastwise freight, amounting to $9,324.03, commissions $699.30 and asked to figure the commissions that would have been payable on that amount of freight at 5%, and answers, "The difference is $233.10."

His attention is then called to the account "Baja California," Voyage 10, Statement March 23, 1917, and to the charge therein of 7½% on coast cargo, amounting to $4,326.88, commissions $324.52, and asked to figure that at 5% and give us the difference and says the difference is $108.18.

His attention is then called to "Baja California" Voyage 11, which shows a charge of 7½% commis-

sion, $28142. Figured at 5% it would be $187.62, or a difference of $93.80.

Counsel admitted these figures were correct.

Defendant then testified that the total of the above difference in commission, that is, the difference between what [164—141]—he charged and 5% is $1.-479.37.

Plaintiff then introduces a letter from plaintiff to defendant, under date of December 21, 1917, which is marked Plaintiff's Exhibit No. 9, and which is as follows:

**Plaintiff's Exhibit No. 9.**

"Referring to my letter of the 14th inst., I beg to state that I have found the following error, in going through the account fro 'Governor Forbes,' 'Voyage 3';

7½% commission inward freight $38,637.73, which, of course, is meant to be 5%, and I shall thank you to pay the difference to my Frisco office, viz, $965.93."

"Kristiania, November 10th, 1917.

"C. Henry Smith, Esq.,

"Dear Sir:

"I duly received your various letters of 8th, 14th, 24th and 28th August, further of 1st and 25th of September, contents of which do not call for any comment on my part presently.

"Meanwhile I confirm my letter of 31st ult., in which I stated that I could not understand that there should only be a balance of $25,000 in my favor, on account of final settlement. I now learn by a cable received from Mr. Lindvig that about $64,000, have been paid out of 'Regulus' net earnings, but I have

received no advice as to what has been done with the following balance, according your statements: $41,523.86, balance from 'Baja C.,' voyage 11, $9,957.37, balance from 'Gov. Forbes,' voyage 2.

"Respecting the Nitrate contract, I wrote you on the 6th inst., and I do not need to add anything now that I learn from Mr. Lindvig that you intend to retain 5 per cent, on whole nitrate contract, against which I earnestly protest.

"The position of the Baja C. is not so satisfactory as it might be expected. This is due to very high taxes of war, which the Company will have to pay, and besides, the expenses have been very high. There will probably be no more dividend for 1917 than 25 per cent, at the close of the year. These 25 per cent, will probably be distributed shortly. In case you should care to sell your shares, you may let me know. I mentioned this, as you cabled me on the 5th October, asking whether I would sell my interests in the Baja Company.

"Yours very truly,
"A. O. LINDVIG."

**Exhibit "D."**

"January 16, 1915.

"A. O. Lindvig, Esq.,
"Christiania, Norway.

"Dear Sir:

"We beg to hand you herewith statement of 'Baja [165—142] California' on the outward trip to San Francisco, and in support of the items given, also invoices and receipts.

"The 'Baja California' cleared from here Christmas Eve, Dec. 24th, for Seattle, loading southbound as already reported to you by cable. She underwent the necessary changes with regard to the oil burning system, and also took on, all told, 1720 barrels oil. We have made a contract with the Standard Oil Co., at a very favorable rate, viz: 65 cents per barrel, which we have been informed is the lowest price that has been made in San Francisco for four years. The steamer will probably burn about 75 barrels per day, and as the price of coal is $7.25 per ton, you may figure what saving may be effected by burning oil figuring that she burns 15 tons of average good coal per day. The cost of the change in connection with the oil burning system as we have advised is about $1269.94, and as soon as we have the specified invoice, we will advise you further in that connection.

"On the Panama Canal invoice, we have you credit for telegrams, as these should be paid out of our allowance per month covering such expenditure. We hardly believe, however, that $45.00 per month would cover this cost, as the cost of telegrams for us run up very high, and some of our agents insist also on having their telegrams paid, so we are out considerable every month. On certain freight we are also compelled to pay 2½ per cent., and some firms, both steamship companies and shippers, insist on 5 per cent. In the latter case we would of course be out the entire commission if we accepted such freight."

**Exhibit "E."**

"Kristiania, 8th February, 1915.

"Messrs. C. Henry Smith, Inc.

"San Francisco.

"Dear Sirs:

"I duly received your favors of the 15th and 16th, also telegram of the 5th inst., from which I note that you can now obtain 6 dollars per ton for the 30000 tons shipment over one year —

"As telegraphed you in reply I consider this quantity too large for such a period as it would of course be quite impossible to manage it, with only two steamers. I added in my telegram that the S/S 'Henry Ibsen' is just reported having been closed with nitrate from Chile to U. S. at 50/–per ton, so you will observe that the freights are advancing also in that direction.

"I am very glad to note that you have been able to make a contract with the Standard Oil Co. at 65 cents per barrel, which is very favorable.

"The British Government now insists upon receiving a bank guarantee for the half of the ships value. That the ship will not be used in the service of the enemies of the U. S. or their allies, and that she will not carry any goods, which may be destined for or transshipped to the said enemies. I am now trying to induce the British authorities to waive this demand, but am afraid my application will not be complied with, and that I shall have to arrange [166—143] for the bank-guarantee required.

"Yours truly,

"A. O. LINDVIG."

**Exhibit "F."**

"December 28, 1915.

"A. O. Lindvig, Esq.,

"Christiania, Norway.

"Dear Sir:

"S/S 'Sinaloa':—

"In connection with the statement rendered by the Anglo American Steamship Agencies, Inc., for the 'Sinaloa' loading, we have in the meantime, received a refund for the wharfage from the Panama Canal of $66.25, which we will include in our next statement to you.

"A further refund due the steamer is as follows:

| | |
|---|---|
| For Tug Service | $3.00 |
| For Pilotage | 27.00 |
| For Handling Lines | 10.00 |
| For Handling Ashes | 12.50 |
| All told | $52.50 |

"We have written twice to Alaska to the Government Commissioner there, for the dead freight due, but have as yet not heard from him. It would of course, take a little longer time to get this refund from the Government as it would otherwise, but you may rest assured that we are doing all we can to get this money as soon as possible.

"As to commission charged on expenses paid by the agents, it is in some instances customary to do so; to charge $2.50 or even 5 per cent, on such disbursements. For instance, if the agent in South America would advance money for a steamer, which may not

be paid for 30 or more days, he would of course be entitled to some remuneration for this service. We are, of course, at all times trying to avoid unnecessary expenses, and we shall in the future, as far as the Northern ports are concerned, have our own men attend to disbursements there.

" 'Archer'

"The vessel is now out in the stream in San Francisco Bay and we are at this time drawing up specifications for repairs and for overhauling. We shall advise you in the next few days as to the whole arragement.

"The whole quesion is, whether we can obtain an engine large enough for the vessel. We telegraphed you about an engine being on exhibit now at the Panama Fair. This engine is 200 H. P. and the manufacturers claim that it can develop even 225 H. P. which would give the vessel a speed of 7 knots loaded. An accurate estimate in that respect however, is hard to obtain. It was our intention to change the vessel into a four-mast Schooner which [167—144] would increase her sailing power and make a few changes to give her more space for cargo. As we already have advised, she now has a Coal-Gas Producing Engine and we are also ascertaining whether it may be practicable to overhaul and repair this engine and operate one or two trips until we get an oil engine, instead of buying coal in Mexico, which is at present very high. We have been informed that it has sold up to $22.00 per ton and in that case she would not be very economical down there.

"We have been offered by several parties, a higher price than we paid for her, and one man offered today $27,000.00 for her as she is today. In the Mexican run she would we believe, be suitable, although the insurance would be considerably higher than on the steamer. The steam Schooners running down there at the present time, pay from 5 per cent to 8 per cent, and the shippers have asked us many times to obtain a steamer for the trade. We note that you mention the S. S. 'Progresso,' which would, of course, be entirely suitable. She is the exact size for the trade: being also an oil burner she would be very economical here. As the Panama Canal is now open for vessels of this size, she could get through at any time.

"We have been offered freight northbound from Panama Canal to Alaska, or even touching the Central American ports of call northbound, we could fill her up, or we could even get freight southbound from Panama for Nitrate ports. At all events if you are still interested in sending her out here, we would surely make good use of her in the Central American trade. Kindly send us a cable if you are disposed to send her out.

"S/S 'Rizal.'

"This steamer is now, so far as we understand, altogether out of the market and we cannot get the owners to reply to any proposition.

"S/S 'Mazatlan.'

"She was changed to American Registry and is now being operated under the name of "Edna."

At present she is in Balboa on the way to South American ports with general cargo.

"S/S 'Sinaloa,' Voy. No. 3.

"She is now fully booked for this trip with lumber and flour, Callao and Arica. Lumber rates are at present very good, being up to $22.00 per 1,000 feet. Her total freight will amount to about $35,000.00. We are also closing the 'Baja California' for Guayquil and Talara Bay, where oil is obtainable and Callao, as well as Arica—lumber and flour at similar rates.

"Yours very truly."

[168—145]

**Exhibit "G."**

"Kristiania, May 3d, 1917.

"Messrs. C. Henry Smith, Inc.

"San Francisco,

"Dear Sirs:

"Since writing you on the 21st inst. I have received your statements dates 22nd March, etc., referring to the 'Governor Forbes,' 'Baja California,' and 'Regulus.' I shall revert the same, after having gone through our accounts.

"In the meanwhile I have noticed, at a glance, that the cost of repairs for the former steamer have been frightful and very much higher than what you wrote on the 15th February.

"Nitrate Contract. I received your cable of 30th ult.

> " 'Believe Dupont inclined make new contract stop Wilmington manager will be here shortly stop will cable best rate obtainable stop last

charters sailing ships twelve dollars stop please cable if in order negotiating.'

and have replied today as follows:

"'Consider twelve dollars too low if better not possible suggest fixing contract for Baja Sinaloa Regulus for one year about 35000 tons our option up to 50000 tons at fifteen dollars clean terms.'

As the present rate for sailing ships *in* $12, I consider that the rate for steamers must be at least $15. I now await to hear what you have been able to do, on basis hereof.

"S. S. 'Governor Forbes.' You state in your cable of 30th ult. that she has sailed for San Francisco. Please note that I cannot find having received any advice of this vessel's movements since she arrived at Guayquil on the 13th April.

Cable to Mr. Lindvig. I note that same has been delivered.

"Commissions to Duncan Fox &c., Referring to an account from Duncan Fox, &c., dated Lima, 20th December, referring to S. S. 'Sinaloa.' I note that I have been debited with 7½% commission. As far as I can judge by your letter of 23rd December last year, the said firm has practically agreed to charge only 2½% commission for themselves, and consequently I consider that the total commission ought not to exceed 5 per cent, in such cases. Please let me hear how you look at this.

"Statement dated 22nd March. You have debited 'A. O. Lindvig' for several items, for instance,

'Guilde Publishing Co.,' &c. I do not know what this refers to.

"Yours faithfully,

"A. O. LINDVIG.

"P. S.—Nitrate Contract. War Insurance. As the war insurance premiums have lately been increased heavily—for instance 100 per cent, as far as the W. C. of America is concerned—I am obliged to stipulate that any further advance decided by the Norwegian War Insurance will have to be paid by charterers. The present rate is 4 per cent, per annum. I shall be cabling you re this." [169—146]

**Exhibit "H."**

"June 28th, 1917.

"A. O. Lindvig, Esq.,

"Kristiania, N.

"Dear Sir:

"We are in receipt of your letters of May 1st, 3rd, and 10th, together with duplicates, and contents noted.

"Sinaloa Claim—Treasury Dept.

"We have a statement of the decision of this case, but we have filed our petition for a rehearing in the matter, and expect to have a settlement as to how the case stands in the near future.

"Sinaloa Aground at Cape Blanco.

"We beg to refer you to our cables exchanged in this connection, and may say that we have had quite some difficulty in assembling salvage equipment. There is no salvage company on this coast excepting the British Columbia Salvage Co. at Victoria, owners

of the steamer 'Salvor.' This company has only the one boat, which happened to be engaged in connection with another wreck of the C. P. R. SS. Co. in the North.

"We tried very hard to get a suitable boat for the salvage operation, both in Seattle and Portland as well as in San Francisco, but unfortunately at this time of course, every vessel is engaged some way or other owing to the position of the freight market, and no one seems to be inclined to lend any of their boats for the purpose of salving the 'Sinaloa,' fearing they may loose their vessel in doing so.

"We chartered the SS. Greenwood at the suggestion of Capt. Curtis, who is at the wreck representing the Underwriters here, but engaged by us solely for this purpose. The Greenwood, however, after having loaded all the gear and equipment necessary, broke down outside the Golden Gate and had to return to port. In the meantime we engaged the Phoenix for the same purpose, and also a barge to tow the equipment up to Cape Blanco, and we are now ready for sea with the second expedition.

"We have not been able to fix the insurance and we therefore cabled you to place same at the best possible figure. We have also cabled London to place the insurance there if possible.

"The situation so far as the 'Sinaloa' is concerned, is practically the same. However, last Sunday a rough gale moved the ship sixty yards nearer shore. Capt. Curtis, however, telegraphed us that there is a very good prospect to save the vessel, and the nitrate in the forward holds has not been dis-

charged yet, as it was not deemed advisable to do so before pumping out the water in the after holds and until the moorings are laid.

"We appointed Johnson & Higgins average adjusters on the Hull as they presented evidence to me that they represented the Skuld Association of Underwriters, and they assisted in every way possible. In the meantime, however, we received your cable stating that Wilcox, Peck & Hughes should attend to the adjustments for the Hull Underwriters, and we so advised Johnson & Higgins, who have entirely withdrawn. We shall now keep you advised by cable as to our further movements in the salvage work.

"Transfer Money.

"Regarding the money that we have deposited in the First National Bank to your credit, we have cabled you that about $45,000 belongs to the Baja California Co., as shown on the [170—147] statements which no doubt are in your possession now.

"NITRATE CONTRACT.

"We cabled you a few days ago that Mr. Simonton of the Dupont Co. is now in the City, and prepared to make a new contract with us for next year's requirements in the amount of 40,000 tons, 10 per cent. more or less. The rate he intimated was $12.50 pr ton, which is a little better than we indicated in our cable of April 30th. At the time we were cabling on this matter in April, I see that we did not receive your cable suggesting 35,000 tons or our option 50,000 tons at $15.00.

"Of course, there are certain advantages for carrying nitrate for the Dupont people, as we can always

make arrangements about discharging cargo at this port or up north as the situation would require, in case of labor troubles or otherwise; and also, as the new steamer is going, as we understand, into this nitrate business, the Dupont people may give us certain assistance in getting the steamer earlier than we had at first anticipated.

"Commissions to Duncan Fox & Co.

"We wrote you some time ago in connection with the commission that we had allowed sub-agents in South America. We find that under certain circumstances we cannot obtain any cargo from certain firms unless we allow 5 per cent. We have, so far as Duncan Fox & Co. are concerned, arranged with them for a commission of 4 per cent., which leaves us 3½ per cent, to cover our own expenses, etc., and we do not believe this is exorbitant in any way.

New 6000 Tonner.

"We are, of course, keeping in touch with the situation, and may inform you at this time that so far as we understand the Government will take over all contracts, and we do not believe any transfer of this vessel can be effected in the way that you suggest. We may, however, be able to arrange with the United States Shipping Board, that the vessel be operated under the American Flag for the present owners, in the nitrate trade. I would like to hear from you eventually by cable, your attitude in this connection." [171—148]

The Court erred in giving the following instruction to the jury:

"This cause has taken a course which calls upon

me at this time to direct you to find a verdict in favor of the plaintiff. It is not essential that you leave your seats; you may select one of your number as foreman and have him sign the verdict."

To the giving of said instruction defendant duly excepted and said exception is here designated as

EXCEPTION No. TWENTY-ONE.

The Court erred in refusing to give the defendant's instruction number one, requested by defendant, and reading:

"If you find that defendant acted as agent for plaintiff in the transactions involved in this case, defendant has a right to deduct from the claim of the plaintiff any lawful claims arising out of his agency, by way of compensation, advances or reimbursements, and interest on such advances."

To the refusal of the Court to give said instruction defendant duly excepted and said exception is here designated as

EXCEPTION No. TWENTY-TWO.

The Court erred in refusing to give instruction No. 2, requested by defendant, and reading:

"In order to entitle defendant to remuneration for services rendered as agent, by way of commissions or otherwise, it is not necessary to show an express request for the services by plaintiff as defendant's principal, but such a request may be implied from the circumstances disclosed by the evidence."

To the refusal of the Court to give said instruction defendant duly excepted and said exception is here designated as

EXCEPTION No. TWENTY-THREE.

The Court erred in refusing to give instruction No. 8, requested by the defendant, and reading: [172—149]

"In case you shall find that the defendant in any particular instance, acted as plaintiff's agent without any authority to so act, or in excess of the authority given by plaintiff, but that defendant's acts were thereafter ratified by plaintiff, or that the plaintiff accepted the benefit of defendant's services, I instruct you that defendant is entitled to the same compensation and remedy for performing said acts as if he had been duly authorized to perform the same."

To the refusal of the Court to give said instruction requested by the defendant, defendant duly excepted and said exception is here designated as

EXCEPTION No. TWENTY-FOUR.

The Court erred in refusing to give instruction No. 9, requested by the defendant, and reading:

"If you find that defendant has performed on his part all the acts necessary to the accomplishment of a particular result, such as the freighting of 40,000 tons 10% more or less, of cargo in plaintiff's vessels, for and on behalf of the DuPont de Nemours Powder Company, defendant cannot be deprived of his right to the entire compensation by the refusal or neglect of the plaintiff to thereafter perform the necessary acts on his part, whereby the contemplated result is defeated or only partly executed."

To the refusal of the Court to give said instruc-

tion defendant duly excepted and said exception is here designated as

EXCEPTION No. TWENTY-FIVE.

The Court erred in refusing to give instruction No. 10, requested by the defendant, and reading:

"The failure, refusal or inability of plaintiff to carry out the complete contract for the transportation of $40,000 tons, 10% more or less, of cargo for the DuPont de Nemours Powder Company does not defeat defendant's right to full compensation for negotiating this contract, nor is this right defeated by the fact, if it be a fact, that plaintiff and the Du Pont de Nemours Powder Company subsequently modified, rescinded or cancelled the contract or a part thereof by mutual consent."

To the refusal of the Court to give said instruction defendant duly excepted and said exception is here designated as

EXCEPTION No. TWENTY-SIX.

The Court erred in refusing to give instruction No. 11, requested by the defendant, and reading: [173—150]

"If you find that plaintiff carried out or offered to perform the agreement with DuPont de Nemours Powder Company, or a part of said agreement, with knowledge of the whole agreement, I instruct you that such conduct on the part of plaintiff constitutes a ratification of the whole agreement, and that defendant is entitled to compensation for procuring the said agreement."

To the refusal of the Court to give said instruction

defendant duly excepted and said exception is here designated as

EXCEPTION No. TWENTY-SEVEN.

The Court erred in refusing to give instruction No. 12, requested by the defendant, and reading:

"If you are satisfied that defendant was originally appointed to act as general agent for plaintiff on the Pacific Coast, the facts shown by the evidence must be liberally construed in favor of a ratification by plaintiff of defendant's acts, and you may consider very slight circumstances and small matters as sufficient to raise a presumption of ratification, especially if you should also find that the defendant's acts were for the benefit of the plaintiff."

To the refusal of the Court to give said instruction defendant duly excepted and said exception is here designated as

EXCEPTION No. TWENTY-EIGHT.

The Court erred in refusing to give instruction No. 13, requested by the defendant and reading:

"If you find that defendant was to receive commissions for contracts made for the benefit of plaintiff and that during the term of his agency, he procured contracts for the benefit of plaintiff, I instruct you that defendant is entitled to commissions not merely on the contracts which were performed before the termination of defendant's agency, but that defendant is also entitled to commissions on all contracts secured by him and performed, or to be performed, by plaintiff subsequent to the termination of defendant's agency."

To the refusal of the Court to give said instruction defendant duly excepted and said exception is here designated as

EXCEPTION No. TWENTY-NINE.

The Court erred in refusing to give instruction No. 14, requested by the defendant, and reading:

"The bill of particulars filed by the plaintiff herein is to be considered as an amplification of his complaint and said bill of particulars specifically disputes the following items in the defendant's accounts; [174—151]

| | | |
|---|---|---|
| 1. | Remuneration re contract of 'Regulus'..... | $ 6,000.00 |
| 2. | Remuneration re contract 'Romulus'. | 10,000.00 |
| 3. | Commission on purchase of 'Governor Forbes'..... | 6,800.00 |
| 4. | Commission on 'Sinaloa' salvage.... | 3,165.27 |
| 5. | Commission Dupont Powder Co..... | 25,517.80 |
| 6. | Commission in inward freight of 'Governor Forbes'..... | 2,049.65 |
| 7. | Retention of balance stated by Mr. Smith as an estimated amount for procuring bookings of freight prior to October 1, 1917..... | 5,000.00 |

"The above-mentioned disputed items total the sum of $58,532.75, and these are the items which are to be considered and passed upon by you; all other items in the defendant's accounts are assumed to be correct."

To the refusal of the Court to give said instruction defendant duly excepted and said exception is here designated

EXCEPTION No. THIRTY.

The Court erred in refusing to give instruction No. 15, requested by the defendant, and reading:

"The defendant is entitled to recover a commission on the purchase of the 'Governor Forbes,' notwithstanding he may have entered into an agreement for the purchase of said vessel in November, 1916, and notwithstanding the payment of her purchase price may have been completed in the spring of 1917, provided you believe from the evidence that the services rendered by the defendant in connection with the cablegrams exchanged between him and the plaintiff entitled him to such a commission and provided you believe that the omission to enter said commission upon any of the accounts presented to the plaintiff prior to October 1, 1917, was due to inadvertence and mistake."

To the refusal of the Court to give said instruction defendant duly excepted and said exception is here designated

EXCEPTION No. THIRTY-ONE.

The Court erred in refusing to give instruction No. 16, requested by the defendant, and reading:

"The Court instructs the jury to find in favor of the defendant as to the item of $12,050 referred to in plaintiff's bill of particulars, for the details of which it is therein stated that the plaintiff has sent to Christiania."

To the refusal of the Court to give said instruction defendant duly excepted and said exception is here designated [175—152]

EXCEPTION No. THIRTY-TWO.

The Court erred in refusing to give instruction No. 17, requested by the defendant and reading:

"I charge you that the agency contract entered into by and between A. O. Lindvig and C. Henry Smith on June 29, 1914, had sole reference to C. Henry Smith acting as the agent for the 'A/S/Baja California' in the operation of steamers between Mexican, Central American, West Coast of United States and British Columbia ports; and I instruct you that the services rendered by C. Henry Smith in contracting for, and supervising the construction of the 'Romulus' and 'Regulus' and in purchasing the 'Governor Forbes,' were not included within his duties as agent under said contract of June 29, 1914."

To the refusal of the Court to give said instruction defendant duly excepted, and said exception is here designated

EXCEPTION No. THIRTY-THREE.

The Court erred in refusing to give instruction No. 18, requested by the defendant, and reading:

"Where there is a written contract between a principal and an agent providing for a certain compensation to the agent for the performance by him of the services required or contemplated by the contract, and services are rendered by the agent in addition to those required or contemplated by the written contract and in connection with transactions not included in the matters to be attended to by the agent under the written contract, and such extra

services are of such a nature and were rendered under such circumstances as to imply a promise on the part of the principal to pay for the same, then and under such circumstances, I charge you that the agent is entitled to recover the reasonable value of such extra services."

To the refusal of the Court to give said instruction defendant duly excepted, and said exception is here designated

EXCEPTION No. THIRTY-FOUR.

The Court erred in refusing to give instruction No. 19, rquested by the defendant, and reading:

"Whenever the circumstances under which services were rendered and the character of the services performed, create a legal liability to pay on the part of the person for whose benefit the services were performed, the law implies a promise to pay for such services; and the request necessary to support such promise may be inferred from the beneficial nature of the services and the circumstances of he transaction." [176—153]

To the refusal of the Court to give said instruction defendant duly excepted, and said exception is here designated

EXCEPTION No. THIRTY-FIVE.

The Court erred in refusing to give instruction No. 20, requested by the defendant, and reading:

"As to the item of $2,049.65 as defendant's commission on the inward freight of the 'Governor Forbes,' I charge you as a matter of law that your verdict should be in favor of the defendant,"

To the refusal of the Court to give said instruction defendant duly excepted, and said exception is here designated

EXCEPTION No. THIRTY-SIX.

The Court erred in refusing to give instruction No. 23, requested by the defendant, and reading:

"I instruct you that it is not necessary for the defendant to prove an express promise by the plaintiff to compensate the defendant for his services in connection with the contracting and building of the 'Regulus' and 'Romulus.' It is sufficient for the defendant if he proves in this behalf that the services rendered by him in connection with the contracting and building of said vessels were outside of the scope of his duties under the agency contract of June 29, 1914, and that his services in connection with the contracting and building of said vessels were beneficial to the plaintiff and were of such a nature and rendered under such circumstances as to imply a promise upon the part of the plaintiff to pay for said services."

To the refusal of the Court to give said instruction defendant duly excepted, and said exception is here designated

EXCEPTION No. THIRTY-SEVEN.

The Court erred in refusing to give instruction No. 24, requested by the defendant, and reading:

"If you believe from the evidence in this case that prior to the termination of the defendant's agency the employees of the defendant engaged cargo for sailings scheduled to occur within a few days sub-

sequent to the termination of the defendant's agency, and that upon the termination of the defendant's agency his former employees removed to the newly established office of the plaintiff all records of such cargo engagements, and that thereafter, when demand was made by defendant upon the plaintiff for a statement of the cargo booked prior to [177—154] the termination of the defendant's agency, the defendant at first denied that any cargo excepting a shipment of lumber by the defendant had been booked prior to the termination of the defendant's agency, and that thereafter and as a result of the defendant's demands the plaintiff admitted that some cargo had been booked prior to the termination of the defendant's agency, then, and under such circumstances, I charge you that the burden of proof is upon the plaintiff to show that the defendant has retained as payment of his commission on freight booked prior to the termination of his agency, an amount greater than the defendant is entitled to as his commissions upon the freight engaged prior to the termination of the defendant's agency."

To the refusal of the Court to give said instruction defendant duly excepted, and said exception is here designated

EXCEPTION No. THIRTY-EIGHT.

The Court erred in refusing to give instruction No. 25, requested by the defendant, and reading:

"Although defendant's compensation as agent for plaintiff is specified in the contract of employment, you may nevertheless find, if you believe it to be the

fact, that defendant rendered services to the plaintiff or a character different from that provided for in said contract of employment; and if you so find, then I instruct you that defendant is entitled to a reasonable competition for such services."

To the refusal of the Court to give said instruction defendant duly excepted, and said exception is here designated as

EXCEPTION No. THIRTY-NINE.

The Court erred in refusing to give instruction No. 26, requested by the defendant and reading:

"I instruct you that the defendant is entitled to a reasonable compensation for all services not covered by the contract of June 29, 1914. In determining the value of such services you are not confined to the amounts retained by the defendant in the respective instances, but may consider the value placed by defendant upon such services as one of the circumstances determining, with all the other circumstances surrounding such services, what would be a reasonable compensation, which may be less or greater than the same retained by defendant. In case the sum total of the amounts determined by you to be reasonable in each instance aggregates a sum equal to or greater than the sum of $70,582.72, your verdict must be for the defendant." [178—155]

To the refusal of the Court to give said instruction defendant duly excepted, and said exception is here designated as

EXCEPTION No. FORTY.

To the refusal of the Court to give said instruction No. 27, requested by the defendant, and reading:

"I instruct you that, under the contract of June 29th, 1914, the defendant is entitled to a reasonable commission on the freight earned by the steamers of the Baja California Company in performing the contract with the Du Pont de Nemours Company for the transportation from the Republic of Chile to San Francisco, California, and elsewhere of 40,000 tons, 10% more or less, of nitrate."

To the refusal of the Court to give said instruction defendant duly excepted, and said exception is here designated as

EXCEPTION No. FORTY-ONE.

The Court erred in refusing to give instruction No. 28, requested by the defendant, and reading:

"I instruct you that the contract of June 29th, 1914, between plaintiff and defendant was an agreement with regard to a proposed steamship line to operate steamers between Mexican and Central American ports, and West Coast of United States as well as British Columbia, and that such agreement does not govern the value of services connected with a steamship line operating steamers between South American ports and the West Coast of the United States or British Columbia. That defendant is entitled to a reasonable compensation for any services performed by him for plaintiff in connection with steamers plying between ports of the United States or British Columbia and South American ports."

To the refusal of the Court to give said instruction defendant duly excepted, and said exception is here designated as

EXCEPTION No. FORTY-TWO. [179—156]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 16,124.

A. O. LINDVIG,

Plaintiff,

vs.

C. HENRY SMITH,

Defendant.

**Certificate of Judge to Bill of Exceptions.**

The foregoing bill of exceptions is a true bill of exceptions, correct in all respects, and is hereby approved, allowed, settled, certified and may be filed with the clerk of this court and make a part of the record herein, subject to the objection and exception at this time by plaintiff to the action of the Court in certifying the same.

Dated this 9th day of May, A. D. 1921.

(Sgd.) WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed May 9, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [180]

In the District Court of the United States, in and for the Southern Division of the Northern District of California, Division Two.

No. 16,124.

A. O. LINDVIG,

Plaintiff,

vs.

C. HENRY SMITH,

Defendant.

**Petition for Writ of Error.**

To the Honorable, The United States District Court Aboved Named, and to Honorable WILLIAM C. VAN FLEET, Judge Thereof:

C. Henry Smith, the defendant in the above-entitled action, feeling himself aggrieved by the verdict of the jury and the judgment entered against him in the above-entitled cause on the 13th day of June, 1919, and claiming that in the trial of said cause certain errors were committed to his prejudice, all of which appear in detail in the assignment of errors filed herewith, comes now by Andros & Hengstler, and Goodfellow, Eells, Moore & Orrick, his attorneys, and petitions said Court for an order allowing him, said defendant, to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided; and that an order be made fixing the amount of security which the said defendant shall give and furnish upon said writ of error; and that

upon the giving of such security all further proceedings in this Court be suspended [181] and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit. And your petitioner will ever pray.

Dated San Francisco, California, December 11, 1919.

ANDROS & HENGSTLER,
GOODFELLOW, EELLS, MOORE & ORRICK,

Attorneys for Defendant.

[Endorsed]: Filed Dec. 12, 1919. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [182]

---

In the District Court of the United States, in and for the Southern Division of the Northern District of California, Division Two.

No. 16,124.

A. O. LINDVIG,

Plaintiff,

vs.

C. HENRY SMITH,

Defendant.

**Assignment of Errors and Prayer for Reversal.**

C. Henry Smith, the defendant in the above-entitled action, makes and files the following assignment of errors herein to the United States Circuit Court of Appeals for the Ninth Circuit.

The District Court erred in each of the following rulings made by it on the trial of said action:

1. In sustaining plaintiff's objection to the following question propounded by defendant to the witness C. Henry Smith:

> "Q. What was the market value of the 'Regulus' at the time she was completed, on the first day of April, 1917?"

2. In sustaining plaintiff's objection to the following question propounded by defendant to C. Henry Smith:

> "Q. What was the market value of the Romulus' at the time of her completion?"

3. In sustaining plaintiff's objection to the following [183] question propounded by defendant to the witness C. Henry Smith:

> "Q. I will ask you to state whether or not Mr. Lindvig at any time claimed that you were not entitled to your commission on the 'Regulus' until the time that he filed this suit?"

4. In sustaining plaintiff's objection to the following question propounded by defendant to the witness C. Henry Smith:

> "Q. I will ask you to state whether or not Mr. Lindvig at any time either said to you verbally or in writing that you were not entitled to your commission on the 'Regulus' prior to the first day of December, when a question was raised in regard to that matter in a letter written by Mr. Frank, which is carried into the bill of particulars?"

5. In sustaining plaintiff's objection to the following question propounded by the defendant to the witness C. Henry Smith:

"Q. What was the value of the 'Governor Forbes,' the market value here in San Francisco, at the time of her delivery in 1917?"

6. In sustaining plaintiff's objection to the following question propounded by the defendant to the witness John A. Bishop:

"Q. I will ask you to state whether or not you know what the custom is without referring now to any particular contract, what the custom is, if you know, in regard to allowing reimbursement for services by the agent in connection with the salvaging of vessels, where he has a general contract wherein the compensation specified is a percentage of the freight earned?"

7. In sustaining plaintiff's objection to the following question propounded by the defendant to the witness John A. Bishop:

"I will ask you to state whether or not, in all the cases mentioned by you occurring with respect to the vessels named, of which Williams, Dimond & Co. were the agents, and Mr. Gray was the agent, and Evans was the agent, whether or not in each and every of those cases the general agent was allowed compensation for the services rendered by him in connection with those vessels?"

8. In sustaining plaintiff's objection to the following question propounded by the defendant to the witness John A. Bishop:

"Q. I will ask you whether or not it is the custom in all cases where the general agents

render services in connection with the calvage of the vessel, to not only [184] allow him from his principal a compensation for the general services in connection therewith, but an allowance of 2½ per cent on the total amount of disbursements in connection therewith, if the money be that of his principal, and 5 per cent if the money be that of himself?"

9. In sustaining plaintiff's objection to the following question propounded by the defendant to the witness John A. Bishop:

"Q. I will ask you to state whether or not the custom, if any, is uniform, and has been for the last twenty years in this port, whereby general agents are allowed reimbursement for the services rendered by them in connection with the salvage of vessels, where their agency contract merely specified as their remuneration a certain percentage upon the freight earned?"

10. In sustaining plaintiff's objection to the following question propounded by the defendant to the witness John A. Bishop:

"Q. I will ask you to state whether there is now, and has been for 20 years last past a custom in this port, and a uniform custom, whereby the general agent is reimbursed for services rendered by him in connection with the salvage of vessels by the owner, so far as his time and the value of his services rendered in connection therewith are concerned, where he has an agency contract, in which the only compensation speci-

fied is in respect to a percentage upon freight earned?"

11. In sustaining plaintiff's objection to the following question propounded by the defendant to the witness John A. Bishop:

"Q. I will ask you to state whether there is now and has been for 20 years last past a general custom of allowing to the agent, the general agent of a steamship line of steamers, a percentage amounting to 5 per cent on the amount disbursed by him of his own money, is his own money, where he has a general agency contract, in which the only remuneration specified therein is in respect to a percentage of freight earned?"

12. In sustaining plaintiff's objection to the following question propounded by the defendant to the witness John A. Bishop:

"Q. I will ask you if the moneys advanced by the agent are those of the owner, if then he is entitled to the commission of 2½ per cent under the same circumstances, that is, where his general agency contract is one wherein the only compensation justified is a percentage in respect to freight earned?"

13. In sustaining plaintiff's objection to the offer by defendant [185] in evidence of the following items from the "Statement of General Average, Case of the 'Sinaloa,' June 15, 1917":

"$3,165.27, C. Henry Smith—Remuneration for handling a/c
5% Com. on $63,305.54..... $3,165.27."

"Provisions $38.07, General Average, 2826.95. Advances..... $274.90

"Vessel & Owners, $35.35."

"$4,290.82. Disbursing the General Average:

With funds in hand 2½% on $8,552.19..... ..... ..... $213.80

Without funds in hand 5% $81,540.32..... ..... ..... 4,077.02

As customary..... $4,290.82"

"$11,380.74 Interest on General Average Disbursements and allowances from date of outlay until probable date of settlement, $108,388.77 at 7% per annum..... ..... ..... $11,380.74."

14. In sustaining plaintiff's objection to the offer in evidence by the defendant of the following cablegrams exchanged between the plaintiff and the defendant.

"June 16, 1916.

"Sinaloa aground near Cape Blanco in fog this morning have sent tug for assistance.

"SMITH."

"June 17, 1916.

"Alta sailed for Melbourne stop Sinaloa position very difficult stop broadwide to the beach stop leaking stop ten feet water aft hold.

"SMITH."

"June 19, 1916.

"Wilcox Peck Hughes attending average Sinaloa.

"LINDVIG."

"June 20, 1916.

"Urgent Wilcox cable chance floating Sinaloa slight stop everything possible must be done to save her.

"LINDVIG."

"June 20, 1916.

"Kindly cable amount Sinaloa insured stop Smith now at ship stop after hold flooded no water forward stop discharging cargo onto barges.

"SMITH."

"June 22, 1916.

"Steamer Sinaloa insured as follows Seven hundred [186] thousand kroners full three hundred thousand hull interest hundred thousand freight interest stop understand now prospects save ship stop condemnation must be avoided if by any means possible.

"LINDVIG."

"June 21, 1916.

"Sinaloa appointed Johnson and Higgins adjusters stop they are agents for Skuld.

"SMITH."

"June 23rd, 1916.

"Steamer Sinaloa you must adhere to my instructions appoint Wilcox Peck & Hughes who are agents main hull underwriters stop should

otherwise have no objection employ Johnson Higgins.

"LINDVIG."

"June 23, 1916.

"Believe Sinaloa may be floated according to experts stop assembling fuel equipment to go north stop vessel in a rather protected position during summer.

"SMITH."

"June 29, 1916.

"Please insure ocean going barge sent to Sinaloa value fifteen thousand dollars.

"SMITH."

"July 2, 1916.

"Covered hull insurance barge fifteen thousand dollars two per cent voyage Frisco to, steamer Sinaloa therefrom to Puget Sound or Frisco.

"LINDVIG."

"June 30, 1916.

"Please place insurance salvage equipment sent aboard Phoenix and ocean going barge to Sinaloa valued at twenty-five thousand dollars.

"SMITH."

"July 3, 1916.

"Steamer Sinaloa referring your cables 29/6 and 30/6 we have insured two barges and equipment in all 40,000 dollars value is this correct.

"LINDVIG."

15. In sustaining plaintiff's objection to the following question propounded by the defendant to the witness C. Henry Smith:

"Q. I will ask you to state whether you arranged where the vessel should be brought to when she was taken away or when she was floated."

16. In sustaining plaintiff's objection to the following question propounded by the defendant to the witness C. Henry Smith:

"Q. I will ask you to state whether or not you submitted the repairs of the vessel to different shipbuilding [187] yards here in San Francisco on the lowest bid?"

17. In sustaining plaintiff's objection to the following question propounded by the defendant to the witness Wilfred Page:

"Q. What became of the different copies of bound volume entitled 'Statement of the General Average Case of the "Sinaloa," June 15, 1917,' as they were made up, what disposition was made of them?"

18. In sustaining plaintiff's objection to the following question propounded by the defendant to the witness Wilfred Page:

"Q. I will ask you to state whether Mr. Lindvig ever thereafter or any member of his office, dissented from the item therein contained, the $3,165 allowed to Mr. Smith in connection with his services with respect to the salvaging of this vessel?"

19. In sustaining plaintiff's objection to the following question propounded by the defendant to the witness Wilfred Page:

"Q. Was there any contribution to be made by them (Dupont Company) to the general average?"

20. In sustaining plaintiff's objection to the following question propounded by the defendant to the witness Wilfred Page:

"Q. So far as the cargo was concerned, do you know whether or not Mr. Lindvig has, in fact, collected from the cargo upon the basis of including in the general average this item of $3,165, allowed to Mr. Smith?"

21. In sustaining plaintiff's objection to the following question propounded by the defendant to the witness C. Henry Smith:

"Q. As a matter of fact, at the time that bill of particulars was filed, was it true that Mr. A. O. Lindvig did not have the vouchers that supported your different accounts?"

22. In granting plaintiff's motion to strike out plaintiff's bill of particulars.

23. In sustaining plaintiff's objection to the following question propounded by defendant to the witness C. Henry Smith:

"Q. Now, as a matter of fact, Mr. Smith, so far as you can tell at the present time what are the disputed items, or the amount of them?" [188]

24. In sustaining plaintiff's objection to the following question propounded by the defendant to the witness C. Henry Smith:

"Q. I will ask you to state whether Mr. Lindvig, or anyone else connected with the plaintiff

in this case, or anybody else, has ever stated to you what the item of $12,050 has reference to which is mentioned in the bill of particulars filed by the plaintiff in this case, and as to which it is therein stated that they are sending to Christiania for details?"

25. In sustaining plaintiff's objection to the offer in evidence of the following cablegram relating to stock in the corporation owning the "Regulus" from the defendant to the plaintiff, dated January 11, 1916:

"Stock accepted letter twenty-first December."

26. In sustaining plaintiff's objection to defendant's offer in evidence of the following cablegram from the plaintiff to the defendnat, dated January 19, 1916, and relating to stock in the corporation owning the "Regulus."

"If you don't wish to overtake full amount two hundred thousand Kroner Pacific I can dispose of about one hundred thousand Kroner here please telegraph."

27. In sustaining plaintiff's objection to the offer in evidence by defendant of the following cablegram from the defendant to the plaintiff, dated January 19, 1916:

"Cannot give up any of two hundred thousand kroner stock writing."

28. In sustaining plaintiff's objection to the offer in evidence by defendant of the following letter from the defendant to the plaintiff, dated January 19, 1916:

"Referring to your cable which we received today, regarding stock in the new steamer now building at the United Engineering Works, we regret that owing to some arrangements with our friends here we cannot give up any of this stock.

"As we originally asked for not less than $100,000.00 in this steamer, we have been obliged to take very much less than we intended at the outset." [189]

29. In giving the following instruction to the jury:

"This cause has taken a course which calls upon me at this time to direct you to find a verdict in favor of the plaintiff. It is not essential that you leave your seats; you may select one of your number as foreman and have him sign the verdict."

30. In refusing to give the defendant's instruction number I, requested by defendant, and reading:

"If you find that defendant acted as agent for plaintiff in the transactions involved in this case, defendant has a right to deduct from the claim of the plaintiff any lawful claims arising out of his agency, by way of compensation, advances or reimbursements, and interest on such advances."

31. In refusing to give instruction No. 2, requested by defendant, and reading:

"In order to entitle defendant to remuneration for services rendered as agent, by way of commissions or otherwise, it is not necessary to

show an express request for the services by plaintiff as defendant's principal, but such a request may be implied from the circumstances disclosed by the evidence."

32. In refusing to give instruction No. 8, requested by the defendant, and reading:

"In case you shall find that the defendant in any particular instance, acted as plaintiff's agent without any authority to so act, or in excess of the authority given by plaintiff, but that defendant's acts were thereafter ratified by plaintiff, or that the plaintiff accepted the benefit of defendant's services, I instruct you that defendant is entitled to the same compensation and remedy for performing said acts as if he had been duly authorized to perform the same."

33. In refusing to give instruction No. 9, requested by the defendant, and reading:

"If you find that defendant has performed on his parts all the acts necessary to the accomplishment of a particular result, such as the freighting of 40,000 tons, 10% more or less, of cargo in plaintiff's vessels, for and on behalf of the du Pont de Nemours Powder Company, defendant cannot be deprived of his right to the entire compensation by the refusal or neglect of the plaintiff to thereafter perform the necessary acts on his part, whereby the contemplated result is defeated or only partly executed." [190]

34. In refusing to give instruction No. 10, requested by the defendant, and reading:

"The failure, refusal or inability of plaintiff to carry out the complete contract for the transportation of 40,000 tons, 10% more or less, of cargo for the du Pont de Nemours Powder Company does not defeat defendant's right to full compensation for negotiating this contract, nor is this right defeated by the fact, if it be a fact, that plaintiff and the du Pont de Nemours Powder Company subsequently modified, rescinded or cancelled the contract or a part thereof by mutual consent."

35. In refusing to give instruction No. 11, requested by the defendant, and reading:

"If you find that plaintiff carried out or offered to perform the agreement with du Pont de Nemours Powder Company, or a part of said agreement, with knowledge of the whole agreement, I instruct you that such conduct on the part of plaintiff constitutes a ratification of the whole agreement, and that defendant is entitled to compensation for procuring the said agreement."

36. In refusing to give instruction No. 27, requested by the defendant, and reading:

"I instruct you that, under the contract of June 29, 1914, the defendant is entitled to a reasonable commission on the freight earned by the steamers of the Baja California Company in performing the contract with the du Pont de Nemours Powder Company for the transportation from the Republic of Chile, to San Francisco, California, and elsewhere, of 40,000 tons, 10% more or less, of nitrate."

37. In refusing to give instruction No. 12, requested by the defendant, and reading:

> "If you are satisfied that defendant was originally appointed to act as general agent for plaintiff on the Pacific Coast, the facts shown by the evidence must be liberally construed in favor of a ratification by plaintiff of defendant's acts, and you may consider very slight circumstances and small matters as sufficient to raise a presumption of ratification, especially if you should also find that the defendant's acts were for the benefit of the plaintiff."

38. In refusing to give instruction No. 18, requested by the defendant, and reading:

> "Where there is a written contract between a principal [191] and an agent providing for a certain compensation to the agent for the performance by him of the services required or contemplated by the contract, and services are rendered by the agent in addition to those required or contemplated by the written contract, and in connection with transactions not included in the matters to be attended to by the agent under the written contract, and such extra services are of such a nature and were rendered under such circumstances as to imply a promise on the part of the principal to pay for the same, then and under such circumstances I charge you that the agent is entitled to recover the reasonable value of such extra services."

39. In refusing to give instruction No. 25, requested by the defendant, and reading:

"Although defendant's compensation as agent for plaintiff is specified in the contract of employment, you may nevertheless find, if you believe it to be the fact, that defendant rendered services to the plaintiff of a character different from that provided for in said contract of employment; and if you so find, then I instruct you that defendant is entitled to a reasonable compensation for such services."

40. In refusing to give instruction No, 26, requested by the defendant, and reading:

"I instruct you that the defendant is entitled to a reasonable compensation for all services not covered by the contract of June 29, 1914. In determining the value of such services you are not confined to the amounts retained by the defendant in the respective instances, but may consider the value placed by defendant upon such services as one of the circumstances determining, with all the other circumstances surrounding such services, what would be a reasonable compensation, which may be less or greater than the sums retained by defendant. In case the sum total of the amounts determined by you to be reasonable in each instance aggregates a sum equal to or greater than the sum of $70,-582.72, your verdict must be for the defendant."

41. In refusing to give instruction No. 28, requested by the defendant, and reading:

"I instruct you that the contract of June 29, 1914, between plaintiff and defendant, was an agreement with regard to a proposed steamship

line to operate steamers between Mexican and Central American ports, and West Coast of United States as well as British Columbia, and that such agreement does not govern the value of services connected with a steamship line operating steamers between South American ports and the West Coast of the United States or British Columbia. That defendant is entitled to a reasonable compensation for any services performed by him for plaintiff in connection with steamers plying between [192] ports of the United States or British Columbia and South American ports."

42. In refusing to give instruction No. 19, requested by the defendant, and reading:

"Whenever the circumstances under which services were rendered, and the character of the services performed, create a legal liability to pay on the part of the person for whose benefit the services were performed, the law implies a promise to pay for such services; and the request necessary to support such promise may be inferred from the beneficial nature of the services and the circumstances of the transaction."

43. In refusing to give instruction No. 13 requested by the defendant, and reading:

"If you find that defendant was to receive a commission for contracts made for the benefit of plaintiff and that, during the term of his agency, he procured contracts for the benefit of plaintiff, I instruct you that defendant is entitled to commissions not merely on the con-

tracts which were performed before the termination of the defendant's agency, but that defendant is also entitled to commissions on all contracts secured by him, and performed, or to be performed, by plaintiff subsequent to the termination of defendant's agency."

44. In refusing to give instruction No. 20, requested by the defendant, and reading:

"As to the item of $2,049.65 as defendant's commission on the inward freight of the "Governor Forbes,' I charge you as a matter of law that your verdict should be in favor of the defendant."

45. In refusing to give instruction No. 14, requested by the defendant, and reading:

"The bill of particulars filed by the plaintiff herein is to be considered as an amplification of his complaint, and said bill of particulars specifically disputes the following items in the defendant's accounts:

| | | |
|---|---|---|
| 1. | Remuneration re contract of 'Regulus' ..... | $ 6,000.00 |
| 2. | Remuneration re contract of 'Romules' ..... | 10,000.00 |
| 3. | Commission on purchase of 'Governor Forbes'..... | 6,800.00 |
| 4. | Commission of 'Sinaloa' Salvage ..... | 3,165.27 |
| 5. | Commission Dupont Powder Co.. | 25,517.80 |
| 6. | Commission on inward freight of 'Governor Forbes' ..... | 2,049.65 |

[193]

7. Retention of balance stated by Mr. Smith as an estimated amount for procuring bookings of freight prior to Oct. 1, 1917. .$5,000.00

The above mentioned disputed items total the sum of $58,532.75, and these are the items which are to be considered and passed upon by you; all other items in the defendant's accounts are assumed to be correct."

46. In refusing to give instruction No. 16, requested by the defendant, and reading:

"The Court instructs the jury to find in favor of the defendant as to the item of $12,050 referred to in plaintiff's bill of particulars, for the details of which it is therein stated that the plaintiff has sent to Christiania."

47. In refusing to give instruction No. 15, requested by the defendant, and reading:

"The defendant is entitled to recover a commission on the purchase of the 'Governor Forbes' notwithstanding he may have entered into an agreement for the purchase of said vessel in November, 1916, and notwithstanding the payment of her purchase price, may have been completed in the Spring of 1917, provided you believe from the evidence that the services rendered by the defendant in connection with the cablegrams exchanged between him and the plaintiff entitled him to such a commission, and provided you believe that the omission to enter said commission upon any of the accounts presented to the plaintiff prior

to October 1, 1917, was due to inadvertence and mistake."

48. In refusing to give instruction No. 17, requested by the defendant, and reading:

"I charge you that the agency contract entered into by and between A. O. Lindvig and C. Henry Smith on June 29, 1914, had sole reference to C. Henry Smith acting as the agent for the 'A/S Baja California' in the operation of steamers between Mexican, Central America, West Coast of United States, and British Columbia ports; and I instruct you that the services rendered by C. Henry Smith in contracting for, and supervising the construction of the 'Romulus' and 'Regulus,' and in purchasing the 'Governor Forbes,' were not included within his duties as agent under said contract of June 29, 1914."

49. In refusing to give instruction No. 23, requested by the defendant, and reading:

"I instruct you that it is not necessary for the defendant [194] to prove an express promise by the plaintiff to compensate the defendant for his services in connection with the contracting and building of the 'Regulus' and 'Romulus.' It is sufficient for the defendant if he proves in this behalf that the services rendered by him in connection with the contracting and building of said vessels were outside of the scope of his duties under the agency contract of June 29, 1914, and that his services in connection with the contracting and building

of said vessels were beneficial to the plaintiff, and were of such a nature, and rendered under such circumstances as to imply a promise upon the part of the plaintiff to pay for such services."

50. In refusing to give instruction No. 24, requested by the defendant, and reading:

"If you believe from the evidence in this case that prior to the termination of the defendant's agency the employees of the defendant engaged cargo for sailings scheduled to occur within a few days subsequent to the termination of the defendant's agency, and that upon the termination of the defendant's agency his former employees removed to the newly established office of the plaintiff all records of such cargo engagements, and that thereafter when demand was made by the defendant upon the plaintiff for a statement of the cargo booked prior to the termination of the defendant's agency, the defendant at first denied that any cargo excepting a shipment of lumber by the defendant had been booked prior to the termination of the defendant's agency, and that thereafter and as a result of the defendant's demands the plaintiff admitted that some cargo had been booked but failed to disclose the entire amount of cargo booked, prior to the termination of the defendant's agency, then, and under such circumstances, I charge you that the burden of proof is upon the plaintiff to show that the defendant has retained as

payment of his commission on freight booked prior to the termination of his agency, an amount greater than the defendant is entitled to as his commissions upon the freight engaged prior to the termination of the defendant's agency."

51. In directing the jury to find a verdict in favor of the plaintiff.

52. In entering judgment against the defendant on the verdict.

WHEREFORE the said defendant and plaintiff in error prays that the judgment of the said Court be reversed.

ANDROS & HENGSTLER,
GOODFELLOW, EELLS, MOORE & ORRICK,
Attorneys for the Defendant.

[Endorsed]: Filed Dec. 12, 1919. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [195]

---

In the District Court of the United States in and for the Southern Division of the Northern *Division* of California, Division Two.

No. 16,124.

A. O. LINDVIG,
Plaintiff,

vs.

C. HENRY SMITH,
Defendant.

**Order Allowing Writ of Error and Fixing Amount of Bond.**

The defendant having filed herein and presented herewith a petition for writ of error, and an assignment of errors:

NOW, THEREFORE, on motion of Messrs. Andros & Hengstler, and Messrs. Goodfellow, Eells, Moore & Orrick, attorneys for the defendant, IT IS ORDERED that a writ of error be, and the same is hereby allowed for the review of the judgment and verdict entered herein on the 13th day of June, 1919, by the United States Circuit Court of Appeals for the Ninth Circuit, and that the amount of the bond on said writ of error be, and the same is hereby fixed at the sum of Twenty Thousand Dollars ($20,000), and that upon the giving of such bond all further proceedings in this court be suspended, stayed and superseded pending the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: San Francisco, California, December 12, 1919.

WM. C. VAN FLEET,
United States District Judge.

[Endorsed]: Filed Dec. 12, 1919. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [196]

In the District Court of the United States in and for the Southern Division of the Northern District of California, Division Two.

No. 16,124.

A. O. LINDVIG,

Plaintiff,

vs.

C. HENRY SMITH,

Defendant.

**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS: That we, C. Henry Smith as principal, and Globe Indemnity Company, a corporation, incorporated and existing under and by virtue of the laws of the State of New York, doing and authorized to do business in the State of California, as surety, are held and firmly bound unto A. O. Lindvig in the full and just sum of Twenty Thousand ($20,000) Dollars to be paid to said A. O. Lindvig, to which payment well and truly to be made we bind ourselves jointly and severally by these presents.

Sealed with our seals and dated this 12th day of December, 1919.

Whereas, lately in the District Court of the United States in and for the Southern Division of the Northern District of California, Second Division, a judgment was rendered against the defendant above named, and said defendant having obtained from said court a writ of error to the United States Circuit Court of Appeals for the

Ninth Circuit to reverse said judgment:

NOW, THEREFORE, the condition of the above obligation [197] is such that if C. Henry Smith shall prosecute such writ of error to effect and answer all damages and costs if he fails to make his plea good, then the above obligation shall be void; otherwise to remain in full force and effect.

HENRY C. SMITH,
Principal.

[Seal] GLOBE INDEMNITY COMPANY,
By FRANK M. HALL, (Seal)
Attorney in Fact.
By DAVID DUNCAN,
Attorney in Fact.

The foregoing bond both as to form and sufficiency of surety is hereby approved.

WM. C. VAN FLEET,
United States District Judge.

[Endorsed]: Filed Dec. 12, 1919. Walter B. Maling, Clerk. [198]

---

(Title of Court and Cause.)

**Praecipe for Record on Writ of Error.**

To the Clerk of said Court:

Sir: Please prepare transcript on writ of error as follows:

Complaint.
Amended answer.
All bills of particulars.
Verdict.
Judgment.

Bill of exceptions.
Petition for writ of error.
Assignments of errors.
Order allowing writ of error.
Bond on writ of error.
Minute order of June 13, 1919.
Writ of error, and
Citation on writ of error.
Exceptions to alleged bill of particulars, etc.
Minute order of January 7th, 1918.

ANDROS & HENGSTLER,
GOODFELLOW, EELLS, MOORE & ORRICK,
Attorneys for Defendant.

[Endorsed]: Filed Apr. 9, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [199]

---

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,124.

A. O. LINDVIG,
Plaintiff,

vs.

C. HENRY SMITH,
Defendant,

**Certificate of Clerk U. S. District Court to Record on Writ of Error.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of

California, do hereby certify the foregoing one hundred ninety-nine (199) pages, numbered from 1 to 199, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for record on writ of error, as the same remain on file and of record in the above-entitled cause, in the office of the clerk of said Court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $90.60; that said amount was paid by the defendant, and that the original writ of error and citation issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 9th day of May, A. D. 1921.

[Seal] WALTER B. MALING,
Clerk United States District Court for the Northern District of California. [200]

---

**Writ of Error.**

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, Second Division, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between C. Henry Smith, plaintiff in error,

and A. O. Lindvig, defendant in error, a manifest error hath happened, to the great damage of the said C. Henry Smith, plaintiff in error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 12th day of December, in the year of our Lord one thousand nine hundred and nineteen.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern District of California.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by

WM. C. VAN FLEET,
United States District Judge. [201]

Receipt of a copy of the within writ of error is hereby admitted this 12th day of December, 1919.

NATHAN H. FRANK,
IRVING H. FRANK,
Attorneys for Defendant in Error.

[Endorsed]: No. 16,124. United States District Court for the Northern District of California. C. Henry Smith, Plaintiff in Error, vs. A. O. Lindvig, Defendant in Error. Writ of Error. Filed Dec. 13, 1919. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

---

**Return to Writ of Error.**

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day of place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] WALTER B. MALING,
Clerk United States District Court, Northern District of California. [202]

**Citation on Writ of Error.**

UNITED STATES OF AMERICA—ss.

The President of the United States, to A. O. Lindvig, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file on the Clerk's Office of the United States District Court for the Northern District of California, Second Division, wherein C. Henry Smith is the plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 12th day of December, A. D. 1919.

WM. C. VAN FLEET,
United States District Judge. [203]

Receipt of a copy of the within Citation on Writ of Error is hereby admitted this 12th day of December, 1919.

NATHAN H. FRANK,
IRVING H. FRANK,
Attorneys for Defendant in Error.

[Endorsed]: No. 16,124. United States District Court for the Northern District of California. C. Henry C. Smith, Plaintiff in Error, vs. A. O. Lindvig, Defendant in Error. Citation on Writ of Error. Filed Dec. 13, 1919. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

---

[Endorsed]: No. 3681. United States Circuit Court of Appeals for the Ninth Circuit. C. Henry Smith, Plaintiff in Error, vs. A. O. Lindvig, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed May 9, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

---

In the United States Circuit Court of Appeals, for the Ninth Circuit.

C. HENRY SMITH,

Plaintiff in Error,

vs.

A. O. LINDVIG,

Defendant in Error.

**Order Extending Time to and Including February 10, 1920, Within Which to File Record and Docket Cause.**

GOOD CAUSE APPEARING THEREFOR: IT IS HEREBY ORDERED that the time of plaintiff in error above named within which to print the record and file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby, extended to and including the 10th day of February, 1920.

Dated: January 10, 1920.

W. H. HUNT,

Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: No. 3681. In the United States Circuit Court of Appeals, for the Ninth Circuit. C. Henry Smith, Plaintiff in Error, vs. A. O. Lindvig, Defendant in Error. Order Extending Time to and Including February 10, 1920, Within Which to File Record and Docket Cause. Filed Jan. 10, 1920. F. D. Monckton, Clerk. Refiled Apr. 28, 1921. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

C. HENRY SMITH,

Plaintiff in Error,

vs.

A. O. LINDVIG,

Defendant in Error.

**Order Extending time to and Including March 10, 1920, Within Which to File Record and Docket Cause.**

GOOD CAUSE APPEARING THEREFOR: IT IS HEREBY ORDERED that the time of plaintiff in error above named within which to print the record and file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby, extended to and including the 10th day of March, 1920.

Dated February 9, 1920.

W. H. HUNT,

Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: No. —. In the United States Circuit Court of Appeals, for the Ninth Circuit. C. Henry Smith, Plaintiff in Error, vs. A. O. Lindvig, Defendant in Error. Order Extending Time to and Including March 10, 1920, Within Which to File, Record and Docket Cause. Filed Feb. 9, 1920. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

C. HENRY SMITH,

Plaintiff in Error,

vs.

A. O. LINDVIG,

Defendant in Error.

**Order Extending Time to and Including April 10, 1920, Within Which to File Record and Docket Cause.**

GOOD CAUSE APPEARING THEREFOR: IT IS HEREBY ORDERED that the time of plaintiff in error above named within which to print the record and file and docket this cause on writ of error in the United States Court of Appeals for the Ninth Circuit, be, and same is hereby, extended to and including the 10th day of April, 1920.

Dated March 9, 1920.

WM. H. HUNT,

Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: No. ——. In the Circuit Court of Appeals for the Ninth Circuit. C. Henry Smith, Plaintiff in Error, vs. A. O. Lindvig, Defendant in Error. Order Extending Time to and Including April 10, 1920, Within Which to File Record and Docket Cause. Filed Mar. 9, 1920. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

C. HENRY SMITH,

Plaintiff in Error,

vs.

A. O. LINDVIG,

Defendant in Error.

**Order Extending Time to and Including May 10, 1920, Within Which to File Record and Docket Cause.**

GOOD CAUSE APPEARING THEREFOR: IT IS HEREBY ORDERED that the time of plaintiff in error above named within which to print the record and file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit, be, and same is hereby, extended to and including the 10th day of May, 1920.

Dated: April 9, 1920.

WM. H. HUNT,

Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals, for the Ninth Circuit. C. Henry Smith, Plaintiff in Error, vs. A. O. Lindvig, Defendant in Error. Order Extending Time. Filed Apr. 9, 1920. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

C. HENRY SMITH,

Plaintiff in Error,

vs.

A. O. LINDVIG,

Defendant in Error.

**Order Extending Time to and Including June 10, 1920, Within Which to File Record and Docket Cause.**

GOOD CAUSE APPEARING THEREFOR: IT IS HEREBY ORDERED that the time of plaintiff in error above named within which to print the record and file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby extended to and including the 10th day of June, 1920.

Dated: May 10, 1920.

W. H. HUNT,

Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals, for the Ninth Circuit. C. Henry Smith, Plaintiff in Error, vs. A. O. Lindvig, Defendant in Error. Order Extending Time to and Including June 10, 1920, Within Which to File Record and Docket Cause. Filed May 10, 1920. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

C. HENRY SMITH,

Plaintiff in Error,

vs.

A. O. LINDVIG,

Defendant in Error.

**Order Extending Time to and Including July 10, 1920, Within Which to File Record and Docket Cause.**

GOOD CAUSE APPEARING THEREFOR: IT IS HEREBY ORDERED that the time of plaintiff in error above named within which to print the record and file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby, extended to and including the 10th day of July,1920.

Dated: June 9, 1920.

HUNT,

Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. C. Henry Smith, Plaintiff in Error, vs. A. O. Lindvig, Defendant in Error. Order Extending Time to and Including July 10, 1920, Within Which to File Record and Docket Cause. Filed Jun. 9, 1920. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

C. HENRY SMITH,

Plaintiff in Error,

vs.

A. O. LINDVIG,

Defendant in Error.

**Order Extending Time to and Including August 10, 1920, Within Which to File Record and Docket Cause.**

GOOD CAUSE APPEARING THEREFOR: IT IS HEREBY ORDERED that the time of plaintiff in error above named within which to print the record and file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit, be, and same is hereby, extended to and including the 10th day of August, 1920.

Dated: July 10, 1920.

WM. W. MORROW,

Judge of the United States Circuit Court of Appeals, for the Ninth Circuit.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. C. Henry Smith, Plaintiff in Error, vs. A. O. Lindvig, Defendant in Error. Order Extending Time of Plaintiff Within Which to File and Docket Cause. Filed Jul. 10, 1920. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

C. HENRY SMITH,

Plaintiff in Error,

vs.

A. O. LINDVIG,

Defendant in Error.

**Order Extending Time to and Including September 10, 1920, Within Which to File Record and Docket Cause.**

GOOD CAUSE APPEARING THEREFOR: IT IS HEREBY ORDERED that the time of plaintiff in error above named within which to print the record and file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby, extended to and including the 10th day of September, 1920.

Dated: August 10, 1920.

WM. W. MORROW,

Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals, for the Ninth Circuit. C. Henry Smith, Plaintiff in Error, vs. A. O. Lindvig, Defendant in Error. Order Extending Time to and Including September 10, 1920, Within Which to File Record and Docket Cause. Filed Aug. 10, 1920. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

C. HENRY SMITH,

Plaintiff in Error,

vs.

A. O. LINDVIG,

Defendant in Error.

**Order Extending Time to and Including October 9, 1920, Within Which to File Record and Docket Cause.**

GOOD CAUSE APPEARING THEREFOR: IT IS HEREBY ORDERED that the time of plaintiff in error above named within which to print the record and file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby extended to and including the 9th day of October, 1920.

Dated: September 8, 1920.

WM. W. MORROW,

Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

---

[Endorsed]: No. ——. In the United States Circuit Court of Appeals, for the Ninth Circuit. C. Henry Smith, Plaintiff in Error, vs. A. O. Lindvig, Defendant in Error. Order Extending Time to and Including October 9, 1920, Within Which to File Record and Docket Cause. Filed Sep. 8, 1920. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

C. HENRY SMITH,

Plaintiff in Error,

vs.

A. O. LINDVIG,

Defendant in Error.

**Order Extending Time to and Including November 9, 1920, Within Which to File Record and Docket Cause.**

GOOD CAUSE APPEARING THEREFOR: IT IS HEREBY ORDERED that the time of plaintiff in error above named within which to print the record and file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby, extended to and including the 9th day of November, 1920.

Dated October 7, 1920.

WM. W. MORROW,

Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals, for the Ninth Circuit. C. Henry Smith, Plaintiff in Error, vs. A. O. Lindvig, Defendant in Error. Order Extending Time to and Including November 9, 1920, Within Which to File Record and Docket Cause. Filed Oct. 7, 1920. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

No. ——.

C. HENRY SMITH,

Plaintiff in Error,

vs.

A. O. LINDVIG,

Defendant in Error.

**Order Extending Time to and Including December 5, 1920, Within Which to File Record and Docket Cause.**

GOOD CAUSE APPEARING THEREFOR: IT IS HEREBY ORDERED that the time of plaintiff in error above named within which to print the record and file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby, extended to and including the 5th day of December, 1920.

Dated: November 9, 1920.

W. H. HUNT,

Judge of the United States Circuit Court of Appeals, for the Ninth Circuit.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. C. Henry Smith, Plaintiff in Error, vs. A. O. Lindvig, Defendant in Error. Order Extending Time to and Including December 5, 1920, Within Which to File Record and Docket Cause. Filed Nov. 9, 1920. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

C. HENRY SMITH,

Plaintiff in Error,

vs.

A. O. LINDVIG,

Defendant in Error.

**Order Extending Time to and Including January 8, 1921, Within Which to File Record and Docket Cause.**

GOOD CAUSE APPEARING THEREFOR: IT IS HEREBY ORDERED that the time of plaintiff in error above named within which to print the record and file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby, extended to and including the 8th day of January, 1921.

Dated: December 9, 1920.

W. H. HUNT,

Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. C. Henry Smith, Plff. in Error, vs. A. O. Lindvig, Deft. in Error. Order Extending Time to File Record and Docket Cause. Filed Dec. 9, 1920. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

No. 16,124.

C. HENRY SMITH,

Plaintiff in Error,

ve.

A. O. LINDVIG,

Defendant in Error.

**Order Extending Time to and Including February 8, 1921, Within Which to File Record and Docket Cause.**

GOOD CAUSE APPEARING THEREFOR: IT IS HEREBY ORDERED that the time of plaintiff in error above named within which to print the record and file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby, extended to and including the 8th day of February, 1921.

Dated: January 7, 1921.

W. H. HUNT,

Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals, for the Ninth Circuit. C. Henry Smith, Plaintiff in Error, vs. A. O. Lindvig, Defendant in Error. Order Extending Time to and Including February ——, 1921, Within Which to File Record and Docket Cause. Filed Jan. 7, 1921. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

No. 16,124.

C. HENRY SMITH,

Plaintiff in Error,

vs.

A. O. LINDVIG,

Defendant in Error.

**Order Extending Time to and Including March 8, 1921, Within Which to File Record and Docket Cause.**

GOOD CAUSE APPEARING THEREFOR: IT IS HEREBY ORDERED that the time of plaintiff in error above named within which to print the record and file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby, extended to and including the 8th day of March, 1921.

Dated: February 5, 1921.

HUNT,

Judge of the United States Circuit Court of Appeals, for the Ninth Circuit.

[Endorsed]: No. 16,124. Circuit Court of the United States for the Ninth Circuit. C. Henry Smith, Plaintiff in Error, vs. A. O. Lindvig, Defendant in Error. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including Mar. 8, 1921, to File Record and Docket Cause. Filed Feb. 5, 1921. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

No. 16,124.

C. HENRY SMITH,

Plaintiff in Error,

vs.

A. O. LINDVIG,

Defendant in Error.

**Order Extending Time to and Including April 8, 1921, Within Which to File Record and Docket Cause.**

GOOD CAUSE APPEARING THEREFOR: IT IS HEREBY ORDERED that the time of plaintiff in error above named within which to print the record and file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby, extended to and including the 8th day of April, 1921.

Dated: March 5, 1921.

W. H. HUNT,

Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

Receipt of a copy of the within order is hereby admitted this 5th day of March, 1921.

NATHAN H. FRANK,
IRVING H. FRANK,
Attorneys for Defendant in Error.

[Endorsed]: No. 16,124. In the United States Circuit Court of Appeals, for the Ninth Circuit.

C. Henry Smith, Plaintiff in Error, vs. A. O. Lindvig, Defendant in Error. Order Extending Time to and Including April 8, 1921, Within Which to File Record and Docket Cause. Filed Mar. 8, 1921. F. D. Monckton, Clerk.

---

In the United States Circuit Court of Appeals, for the Ninth Circuit.

No. 16,124.

C. HENRY SMITH,

Plaintiff in Error,

vs.

A. O. LINDVIG,

Defendant in Error.

**Order Extending Time to and Including April 21st, 1921, Within Which to File Record and Docket Cause.**

GOOD CAUSE APPEARING THEREFOR: IT IS HEREBY ORDERED that the time of plaintiff in error above named within which to file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby, extended to and including the 21st day of April, 1921.

Dated: April 8, 1921.

WM. H. HUNT,

Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

Receipt of a copy of within order acknowledged this 8th day of April, 1921.

NATHAN H. FRANK,
IRVING H. FRANK,
Attorneys for Defendant in Error.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. C. Henry Smith, Plaintiff in Error, vs. A. O. Lindvig, Defendant in Error. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including April 21, 1921, to File Record and Docket Cause. Filed Apr. 9, 1921. F. D. Monckton, Clerk.

---

In the United States Circuit Court of Appeals, for the Ninth Circuit.

No. ——.

C. HENRY SMITH,
Plaintiff in Error,
vs.
A. O. LINDVIG,
Defendant in Error.

**Order Extending Time to and Including April 26, 1921, to File Record and Docket Cause.**

GOOD CAUSE APPEARING THEREFOR: IT IS HEREBY ORDERED that the time of plaintiff in error above named within which to file the record and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same

is hereby, enlarged and extended to and including the 26th day of April, 1921.

Dated: April 19th, 1921.

W. H. HUNT,

Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals, for the Ninth Circuit. C. Henry Smith, Plaintiff in Error, vs. A. O. Lindvig, Defendant in Error. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including April 26, 1921, to File Record and Docket Cause. Filed Apr. 19, 1921. F. D. Monckton, Clerk.

---

In the United States Circuit Court of Appeals, for the Ninth Circuit.

C. HENRY SMITH,

Plaintiff in Error,

vs.

A. O. LINDVIG,

Defendant in Error.

**Order Extending Time to and Including May 4, 1921, to File Record and Docket Cause.**

GOOD CAUSE APPEARING, IT IS HEREBY ORDERED that the time of plaintiff in error above named within which to file the record and docket this cause on writ of error in the Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby, enlarged and extended to and including the 4th day of May, A. D. 1921.

Dated: this 25th day of April, A. D. 1921.

W. H. HUNT,

Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including May 4, 1921, to File Record and Docket Cause. Filed Apr. 25, 1921. F. D. Monckton, Clerk.

---

At a stated term, to wit, the October Term, A. D. 1920, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Wednesday, the fourth day of May, in the year of our Lord one thousand nine hundred and twenty-one. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; The Honorable ERSKINE M. ROSS, Circuit Judge; The Honorable WILLIAM H. HUNT, Circuit Judge.

No. 3681.

C. HENRY SMITH,

Plaintiff in Error,

vs.

A. O. LINDVIG,

Defendant in Error.

**Order Extending Time to and Including May 10, 1921, to File Record and Docket Cause.**

Upon motion of Mr. F. W. Dorr, on behalf of counsel for the plaintiff in error, Mr. Irving Frank, counsel for the defendant in error, opposing said motion, and good cause therefor appearing, ORDERED time of plaintiff in error to file the record and docket the cause in the above-entitled cause be, and the same is hereby enlarged and extended to and including May 10, 1921.

No. 3681

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

---

C. HENRY SMITH,
*Plaintiff in Error,*

vs.

A. O. LINDVIG,
*Defendant in Error.*

---

## BRIEF FOR PLAINTIFF IN ERROR.

---

ANDROS & HENGSTLER,
GOODFELLOW, EELLS, MOORE & ORRICK,
*Attorneys for Plaintiff in Error.*

FILED
MAY 21 1921
F. D. MONCKTON,
CLERK

## Table of Contents.


Page

I. Statement of the case ..... 1

(1) "Regulus": A charge of $6000.00, for contracting and superintending construction ..... 4

(2) "Romulus": A charge of $10,000.00 for contracting and superintending construction ..... 5

(3) "Governor Forbes": Commission on purchase, $6,800.00 ..... 5

(4) "Sinaloa": A charge of $3165.27 for services in connection with salving and repairing of the steamer ..... 6

(5) Commission on contract with Dupont de Nemours Company, amounting to $25,517.80 ..... 6

(6) A balance of estimated freight earnings of $5000.00 ..... 7

(7) The commission on the inward freight of "Governor Forbes"—$2049.65 ..... 7

II. The questions involved and errors relied upon .... 8

III. The argument ..... 11

First: The fact that the directed verdict is in excess of plaintiff's claim by $12,050, entitles defendant to a reversal of the judgment .... 11

1. As to the object and effect of a bill of particulars ..... 11

2. Plaintiff could not prove damages in excess of $58,532.72 ..... 12

3. The amount of the judgment recoverable by plaintiff was limited to $58,532.72 ..... 13

4. The directed verdict for $70,582.72 should be reversed ..... 14

Second: Even on the assumption that the construction of the contract, as adopted by the court, is correct, the "Regulus", "Romulus", "Governor Forbes" and "Sinaloa" services

Page

ARE NOT MATTERS OF LAW, BUT MATTERS FOR THE DETERMINATION OF A JURY..... 16

THIRD: THE CONSTRUCTION OF THE AGREEMENT IN CONNECTION WITH OUTSIDE SERVICES: DEFENDANT IS ENTITLED TO REASONABLE COMPENSATION THEREFOR.. 22

A. Analysis of the scope of defendant's duties.. 22

B. Principle of construction..... 23

C. Application to the instant case..... 23

D. The construction adopted by the trial court strikes out of the agreement the specification of defendant's duties ..... 26

E. The practical construction placed upon the agreement by the plaintiff himself confirms the contention that defendant was to receive extra compensation for the services..... 28

F. Defendant was entitled to reasonable compensation for the additional services..... 29

G. Under its own construction of the contract, the court erred in excluding evidence of a legal custom entitling defendant, as general agent of the line, to reasonable compensation for the "Romulus", "Regulus", "Governor Forbes" and "Sinaloa" services..... 31

FOURTH: THE CONSTRUCTION OF THE AGREEMENT RELATIVE TO COMMISSIONS ON FREIGHTS EARNED BY THE LINE OUT OF CARGO SECURED BY DEFENDANT, BUT COLLECTED BY THE LINE AFTER EXPIRATION OF DEFENDANT'S TERM OF AGENCY, DEFENDANT IS ENTITLED TO SUCH COMMISSIONS..... 32

CONCLUSION..... 37

No. 3681.

IN THE

# United States Circuit Court of Appeals

**For the Ninth Circuit**

C. HENRY SMITH,
*Plaintiff in Error,*

vs.

A. O. LINDVIG,
*Defendant in Error.*

## BRIEF FOR PLAINTIFF IN ERROR.

### I. Statement of the Case.

Defendant* was engaged at San Francisco in the importing and exporting business since 1908. In the latter part of 1913 he conceived the idea of organizing a Norwegian corporation to operate steamships between British Columbia ports, Seattle, San Francisco, Los Angeles, and ports on the coast of Mexico and Central America. After he and local friends had subscribed $75,000 toward the stock of such a corporation, he sent Captain M. O. Rustad to Norway, for the purpose of interesting Norwegian capital. While in Norway Captain Rustad

* For the sake of brevity plaintiff in error is referred to herein as defendant, and defendant in error as plaintiff.

met plaintiff, a large ship-owner. Captain Rustad then cabled defendant asking "if he should connect with Mr. Lindvig and investigate his standing", and defendant cabled him to do so. Thereafter defendant went to Norway, and on June 29, 1914, entered into the following agreement with plaintiff:

> "Mr. A. O. Lindvig, of Christiania, and Mr. C. Henry Smith of San Francisco have this day made the following agreement *with regard to A/S Baja California,* a steamship line to operate steamers between Mexican and Central American Ports and the West Coast of the United States as well as British Columbia.
>
> For the steamship line as aforementioned Mr. Smith is to act as general agent with authority to appoint subagents, when required, for securing cargo northbound and southbound, fix charters, when sufficient inducements offer, as well make all necessary arrangements for docking and clearing of the steamer at the respective ports of call.
>
> It being also understood that the general agent or subagents are to make contracts, at the lowest competitive rates, for tallying and stevedoring. On all freight earned a commission of five per cent is to be allowed Mr. Smith, including any allowance or allowances made to subagents—Besides this remuneration an allowance per steamer is to be made to cover incidentals, stamps and other disbursements and for travelling expenses, as required, subject to special agreement.
>
> *In the event any steamer or steamers of the A/S Baja California* are fixed by Mr. Smith for other voyages than as hereinbefore mentioned, or on time charter, a commission of 2½ per cent on the freight earned is allowed.

This agreement is to remain in force for a period of three years, provided the line referred to above is maintained so long.

Christiania, 29th. June, 1914.

(Sgd.) A. O. Lindvig,
(Sgd.) C. Henry Smith."

("A/S" stands for corporation.)

(Record, p. 26.)

Two vessels were built for the company at Sunderland, England. These were named the "Sinaloa" and the "Baja California". The "Sinaloa" arrived at San Francisco in December, 1914, the "Baja California" about a month later. These two steamers were operated by the line during 1915 and 1916. The business increased as the result of defendant's labors in securing cargo, and in the fall of 1916 the "Governor Forbes" was purchased and added to the line (Record, p. 145).

The plaintiff's agency terminated by his resignation on August 1, 1917, but was continued by agreement with defendant until October 1, 1917. The dividends paid by the "Baja California" from the beginning of operations up to October 1, 1917, were very high (Record, p. 202).

Plaintiff authorized defendant to retain remittances to meet installment payments on other steamers built by defendant for plaintiff.

The instant case is one wherein the plaintiff, as principal, disputes the right of defendant, as agent, to retain certain commissions claimed by

defendant for services rendered in contracting for and superintending the construction of steamers, in purchasing one steamer, in salving and repairing another steamer, and in securing cargoes for the steamers of the line.

The complaint claims a sum of money amounting to $70,582.72, but the bill of particulars filed by plaintiff specifies items claimed by plaintiff, amounting to $58,532.72 (Record, pp. 9-10; Appendix to this Brief, pp. 1-2).*

These items, aggregating the sum of $58,532,72, are the following in the chronological order of their occurrence:

(1) *"Regulus":* A charge of $6000.00, for contracting and superintending construction.

This steamer was built on the Oakland Estuary for its owner, Pacific Company, of which plaintiff was managing owner, for a contract price of $450,-000.00, at a time when vessels increased rapidly in value so that, by the time of her completion, she was worth two or three times her contract price. Defendant made the contract for her construction in December, 1915, and thereafter made many trips to the place of her construction and gave much of his time in superintending her construction. She was delivered by the builder in March, 1917. For

* For convenient reference the evidence and assignments of errors relating to $12,050 not specified in the bill of particulars, and the disputed items in the bill of particulars, are included in an appendix to this brief.

these services he charged the plaintiff $6000.00, being a commission of about one and one-fourth per cent of the contract price, a charge which plaintiff thereafter found "in order" (Record, p. 72, and Appendix, pp. 5-11).

(2) *"Romulus":* A charge of $10,000.00 for contracting and superintending construction.

This was a sister ship of the "Regulus", and defendant had been working on the matter of securing a contract since December, 1915, and, on September, 15, 1916, as plaintiff's representative, entered into a contract for the construction of this steamer for $775,000.00. Thereafter defendant spent a considerable amount of his time in going to the Oakland Estuary, where this steamer was being built, and in supervising the building of the steamer in accordance with the plans. The steamer was thereafter commandeered by the United States Government. For the services rendered in connection with this steamer defendant retained the sum of $10,000.00, being approximately one and one-fourth per cent of the contract price (Record, pp. 91-92; Appendix, pp. 25-30).

(3) *"Governor Forbes":* Commission on purchase, $6800.

Defendant made arrangements to buy this steamer in 1916 for $340,000.00, with a two per cent commission. Before the purchase the plaintiff was notified of this commission (Record, pp. 94, 145; Appendix, pp. 30-32).

(4) *"Sinaloa":* A charge of $3165.27 for services in connection with the salving and repairing of the steamer.

Defendant offered to show that the "Sinaloa" went aground in the fog near Cape Blanco, Mendocino County, on June 16, 1916; that plaintiff requested defendant to do everything possible to save her; that defendant immediately went out to the steamer, made contracts for salving her, cooperated with the underwriters, disbursed the funds, and, when she was floated, brought her to San Francisco, there submitted her to competitive bidding for the repairs and afterwards, when the lowest bidder failed to go on with the work, defendant conferred with the United States Shipping Board and arranged for the continuation of the repairs, in order to enable the "Sinaloa" to continue the carrying of nitrate for Dupont de Nemours Company (Record, pp. 105-109; Appendix, pp. 32-43

For these services defendant charged the sum of $3,165.27, which remuneration was allowed in the general average adjustment in connection with the stranding of this steamer (Record, p. 131; Appendix, p. 33).

(5) Commission on contract with Dupont de Nemours Company, amounting to $25,517.80.

Defendant entered into a yearly contract with Dupont de Nemours Company for the carriage of nitrate on the return voyage north of the vessels of the line. The last of these contracts was dated

July 10, 1917, and covered the transportation of 40,000 tons during the year June 1, 1917, to June 1, 1918. The sum of $25,517.80, retained by defendant, is the five per cent commission claimed by him on the freight earned by the Dupont de Nemours contract under the agreement with plaintiff of June 29, 1914 (Record, pp. 110-111; Appendix, pp 43-47

(6) A balance of estimated freight earnings of $5000.00.

This item is the five per cent commission claimed, under the agreement of June 29, 1914, on freight earned through cargo booked prior to October 1, 1917, but not actually loaded on board of vessels until after October 1. 1917 (Record, p. 119; Appendix, pp. 47-48

(7) The commission on the inward freight of "Governor Forbes" $2049.65.

This steamer left Guayaquil in September, 1917, with a cargo of cocoa booked during the period of defendant's agency, but arrived in San Francisco on October 3rd, or 4th, 1917, being a few days later than the termination of defendant's agency. The sum of $2049.65 is five per cent of the freight money claimed as commission under the agreement of June 29, 1914 (Record, p. 123) (Appendix 48-49)

The sum total of the preceding seven items is the sum of $58,532.72 specified in the plaintiff's bill of particulars as "the items * * * upon which this

complaint is based". The prayer of plaintiff's complaint is for $70,582.72. The difference between the amount of the prayer in the complaint and the amount itemized and specified in the bill of particulars is the sum of $12,050.00. Defendant excepted to the bill of particulars on the ground of its insufficiency, but the exception was overruled by the trial court, and defendant went to trial ready to meet the issues raised by plaintiff's bill of particulars, and none others (Record, p. 11).

The trial court directed a verdict in favor of the plaintiff for the amount of $70,582.72, with interest from October 1, 1917. The verdict rendered by the jury, and the judgment entered in favor of the plaintiff, was accordingly in the sum of $77,939.00. The principal sum of the verdict exceeds the amount specifically claimed by plaintiff in his bill of particulars by $12,050.00.

---

## II. The Questions Involved and Errors Relied Upon.

*First:* Defendant contends that the court erred in directing a verdict in excess of plaintiff's claim by the sum of $12,050, and in entering judgment against defendant on said verdict.

(Assignments No. 22, 23, 24, 25, 46; Appendix, pp. 2-3).

*Second:* Even on the assumption that the construction of the contract, as adopted by the trial court, is correct, the "Regulus", "Romulus", "Governor Forbes" and "Sinaloa" services, are not matters of law, but matters for the determination of a jury, and it was therefore error to direct a verdict at all.

(Assignments No. 29, 30, 31, 32, 38, 39, 40, 41, 42, 51; Record, pp. 239, 242, 249).

*Third:* Defendant contends that, under his construction of the contract:

1. The court erred in denying him compensation for his services in contracting for and superintending the construction of the steamer "Regulus".

   (Assignments No. 1, 3, 4, 25, 26, 48, 49; Appendix, pp. 22-25.)

2. The court erred in denying him compensation for his services in contracting for and superintending the construction of the steamer "Romulus".

   (Assignments No. 2, 48, 49; Appendix, pp. 29-30.)

3. The court erred in denying him compensation for his services in connection with the purchase of the steamer "Governor Forbes".

   (Assignments No. 5, 47, 48; Appendix, pp. 31-32.)

4. The court erred in denying him compensation for his services in connection with the salving and repairing of the steamer "Sinaloa".

   (Assignments No. 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21; Appendix, p. 38-43

5. The court erred in denying him compensation for securing cargo under the contract with Dupont de Nemours Company.

   (Assignments No. 33, 34, 35, 36, 43; Appendix, p. 44-47

6. The court erred in denying him compensation on cargo secured for the inward voyage of the steamer "Governor Forbes".

   (Assignments No. 43, 44; Appendix, p. 48.)

7. The court erred in denying him compensation for cargoes secured prior to October 1, 1917, although the freight on said cargo was collected subsequent to said date.

   (Assignments No. 43, 44; Appendix, p. 47.)

## III. The Argument.

**FIRST: THE FACT THAT THE DIRECTED VERDICT IS IN EXCESS OF PLAINTIFF'S CLAIM BY $12,050, ENTITLES DEFENDANT TO A REVERSAL OF THE JUDGMENT.**

**1. As to the object and effect of a bill of particulars:**

The function of a bill of particulars is to amplify the pleadings so that the claim of the party on whom demand therefor is made may be clearly defined and concisely set forth, to the *end that there may be no question as to what the claim is.*

*Pitleman v. Fotheringham,* 185 N. Y. S. 385;
*Ames v. Bell,* 5 Cal. App. 1; 89 Pac. 619.

---

A bill of particulars *may limit, but not enlarge,* a claim set up in a declaration.

*A. O. Anderson Trading Co. v. Brody,* 143 App. Div. 681; 184 N. Y. S. 383;
*Offner v. Wilke,* 208 Ill. App. 463.

---

The purpose of a bill of particulars is to set forth IN DETAIL and more minutely PRECISE ACTS OR OMISSIONS of defendant which plaintiff claims render him liable.

*Forbes v. Benson,* 103 A. 228 (R. I.).

A bill of particulars is not a pleading, and it may RESTRICT, but cannot enlarge, THE SCOPE OF RECOVERY PERMISSIBLE UNDER THE DECLARATION.

*Cook v. Dade,* 158 N. W. 175 (Mich.).

**2. Plaintiff could not prove damages in excess of $58,533.72.**

The office of a bill of particulars is not only to define and limit the issues, but also to apprise the opposing parties of WHAT THEY HAVE TO MEET AT THE TRIAL.

*Tompson v. De Visser,* 106 Misc. Rep. 165; 175 N. Y. S. 276.

Defendant did not have to meet, at the trial, the apocryphal claim for $12,050.

---

The object of a bill of particulars is, "of course, to narrow the evidence to the issues framed".

*Curtis v. Phelps,* 209 Fed. 261.

---

"The very function of a bill of particulars is to APPRISE the moving party of the ultimate facts UPON WHICH THE OTHER PARTY PROPOSES TO RELY, without furnishing the mode of proof."

*O-So-Ezy Mop Co. v. Chemical Co.,* 230 Fed. 469, 470.

---

Plaintiff is LIMITED IN HIS DEMAND AND RESTRICTED IN HIS PROOF to the subject-matters SPECIFIED in his bill of particulars.

*King v. Rhodes,* 47 App. D. C. 316;

*Decker v. Lightfoot,* 44 App. D. C. 45;

*Brown v. Calvert,* 34 Kentucky (4 Dana) 219.

"The defendant is only called upon to meet the allegations set out in the bill of particulars, and presumptively he prepares to meet the

items of the bill of particulars AND NOT OTHERS that may be proved against him."

*Armour v. Blumenthal,* 9 La. App. 707; 72 S. E. 168.

"The effect of furnishing the bill is to *limit the evidence* which the plaintiff may offer in support of his claim."

*Chamberlain v. Loewenthal,* 138 Cal. 47.

---

A bill of particulars *may have the effect of a pleading* in so far as it restricts the proof.

*Cicotte v. Wayne Co.,* 44 Mich. 173; 6 N. W. 236.

---

"A bill of particulars is RESTRICTIVE OF THE RIGHT OF RECOVERY STATED IN A DECLARATION, and it is ERROR to admit proof of a cause of action OR DAMAGES NOT THEREIN SPECIFIED."

*Colwell v. Brown,* 103 Ill. App. 22.

**3. The amount of the judgment recoverable by plaintiff was limited to $58,532.72.**

"The bill of particulars limits the proof which plaintiff is entitled to offer and confines it to the subject matter of the items set forth therein, and THUS MAY BE SAID TO WORK A LIMITATION UPON OR AFFECT THE AMOUNT OF THE JUDGMENT TO WHICH THE PLAINTIFF MAY BE ENTITLED."

*Frost v. Internat. Rubber Co.,* 37 R. I. 476; 93 A. 641.

A bill of particulars furnished by the plaintiff to the defendant of the account sued on is to be

regarded as an amplification of the complaint, and FOR THE PURPOSE OF DETERMINING THE PLAINTIFF'S RIGHT OF RECOVERY, or the advisability of evidence in support of the claim, is to be considered as incorporated into the complaint as originally filed.

*Millet v. Bradbury,* 109 Cal. 170.

Items not included in the bill of particulars cannot be proved.

*Ellis v. Crawford,* 39 Cal. 523, 528.

The items of the bill of particulars, in the instant case, aggregate $58,532.72. No item not covered by this sum could be proved, nor could any sum not covered by this sum be recovered.

**4. The directed verdict for $70,582.72 should be reversed.**

In *Palmer v. Reynolds,* 3 Cal. 396, it was held that a judgment on a verdict for damages greater than the demand in the declaration MUST BE REVERSED, and the cause remanded.

As the effect of the bill of particulars is to incorporate the items into the complaint and to limit the complaint, the judgment in the instant case is greater than the demand in the declaration and should be reversed.

Where the largest amount that could be allowed under the pleadings and evidence is MATERIALLY LESS than that found by the judge, the judgment will be reversed.

*Western Contr. Ass'n v. Rettiger,* 9 Kan. A. 885; 61 P. 313.

In an action on several notes, a note for which judgment was entered was *not included in the bill,* nor specifically mentioned in the list appended thereto. It was held that a judgment including the amount of this note must be reversed, as being in excess of the amount claimed in the pleadings.

*Hart v. Chemical National Bank,* 27 So. 926 (Miss.)

In *Houston Ry. Co. v. Shutts,* 90 S. W. 506 (Tex.) it was held that a verdict in excess of the amount named in the pleadings constitutes REVERSIBLE ERROR.

In *Morrisett v. Wood,* 128 Ala. 505; 30 So. 630, the trial court had charged the jury that they were not confined to proof of the items shown by a bill of particulars furnished by plaintiff to defendant before the trial. *Held:* Reversible error.

The court said:

> "The office of a bill of particulars under the statute is to amplify the pleadings, and to prevent surprise of the defendant by furnishing him with a statement of matters against which he is called to defend. The bill, when furnished, *limits the generality of the pleading, and its effect is, and should be, to limit the proof to the particulars stated therein. . . .*"
>
> "The plaintiff will not be permitted to recover under the common count *or any cause of action not included in the bill of particulars filed* with the declaration, and where he files a bill of particulars, *he will not be allowed in the proof to go beyond them. . . .*"

> "The proofs should have been limited to the bill of particulars as to the services rendered, and the value of the particular services when shown. The court therefore erred in the admission of evidence, in not limiting the proof to the plaintiff's bill of particulars."

These authorities show conclusively that plaintiff, under his pleadings, was precluded from showing that he had any right to recover more than $58,-532.72; that the directed verdict for $70,582.72 was excessive, and that the judgment entered thereupon should be reversed.

---

**SECOND: EVEN ON THE ASSUMPTION THAT THE CONSTRUCTION OF THE CONTRACT, AS ADOPTED BY THE COURT, IS CORRECT, THE "REGULUS", "ROMULUS", "GOVERNOR FORBES" AND "SINALOA" SERVICES, ARE NOT MATTERS OF LAW, BUT MATTERS FOR THE DETERMINATION OF A JURY.**

None of these services are within the express duties enumerated in the agreement, under which defendant was

(1) to act as general agent with authority to appoint sub-agents, when required, for securing cargo northbound and southbound;

(2) to fix charters when sufficient inducements offer;

(3) to make all necessary arrangements for docking and clearing of the steamer at the respective ports of call;

(4) to make contracts, at the lowest competitive rates, for tallying and stevedoring (by himself or sub-agents).

The conclusion that defendant was to build, and repair steamers under this agreement can be justified only by striking out all the sixty-one words following after the words "general agent", leaving the mutilated contract in the form:

> *"For the steamship line as aforementioned Mr. Smith is to act as general agent."*

Assuming, for the sake of the argument, that this mutilation of the contract is legally possible, the question remaining to be settled would be:

What are the duties of a general agent for a steamship line? We respectfully submit that this question is not answerable by any rule of law; that the duties of the general agent of one steamship line are different from those of a general agent of a steamship line differently situated; that the implied duties of the general agent of any particular steamship line depend upon all the circumstances surrounding that line, including customs and usages; and that reasonable men might well differ in finding, what duties are within, and what duties without, the customary duties of a general agent of a steamship line.

In other words, the question, what services were to be performed by defendant as the general agent of the steamship line (in the absence of specific agreement) within this agreed compensation, as

such, is a question for the determination of a jury. That the matters in issue with reference to defendant's services in contracting for, constructing, purchasing and salving ships were matters for determination by a jury, is shown by the decision of the Supreme Court of California in the case of:

*Brown v. Crown Gold Milling Co.,* 150 Cal. 389, in which the Supreme Court used the following language:

> "In the next instruction complained of the Court told the jury, in effect, that if they believed from the evidence that the plaintiff was employed by defendant for the sole purpose of exploiting a certain specific machine—that is, explaining it and its mode of operation, and the results produced by it, to persons inquiring concerning it, and meeting arguments and objections made against it—and also find from the evidence that these services were to be rendered at a specified sum per week, which was paid, still if they found that during the term of his employment plaintiff, at the request of defendant, rendered certain services outside the sphere of his employment, he was entitled to recover a reasonable compensation for such services, although there was no express agreement to pay therefor.
>
> No exception can be taken to the instruction as embodying a correct principle of law.
>
> It is claimed, however, by appellant, that it had no application to the facts in the case at bar, it being insisted that the extra services which plaintiff claims to have performed were all in connection with the operation and success of the machine relative to which he was employed. *But whether these services which were claimed to have been extra were so, or were in the line*

> *of plaintiff's employment, were matters for determination by a jury,* and their verdict must be deemed conclusive on the subject."

In *Pittsburgh Railroad Company v. Henderson,* 36 N. E. 376 (Ind. 1894) the plaintiff was employed by the defendant as general ticket and freight agent at a railroad station. He sued for extra compensation for carrying mail for the defendant between the post office and the railroad station. The defendant contended, that, as to his right to extra compensation, the intent of the parties must be gathered from the contract itself, and that, as a matter of law, his employment covered his compensation for the service of carrying the mail.

The court, in its opinion, gave full recognition to the rule set out in *Wood, Master and Servant:*

> "One employed at a regular salary to perform certain duties or labor is not entitled to additional compensation on account of additional or increased labor in the same line of employment, in the absence of an express promise to pay for such additional labor;"

but the court said:

> "We are unable to conceive how it can be held *as a matter of law* that the employment as ticket and freight agent includes the duty of carrying the mail between the station and the post office.
>
> If carrying the mail from the depot to the post office was not a part of the service required by appellee in connection with his employment as ticket and freight agent, then he may recover."

In *Reiser v. Staufer,* 41 N. W. 706 (Wis. 1889), the plaintiff was employed, under a written contract, to take entire charge of and to keep in order, all engines, boilers, pumps and all other machinery in defendant's saw mill, for a certain sum per year. During the year he superintended the construction of a well, pump and water works for the protection of the lumber yard, adjoining the saw mill, against fire.

The court held:

(1) This work was not in terms included in the contract.

(2) The jury was justified, on conflicting evidence, in finding that there was an implied contract to pay for plaintiff's work and materials at their reasonable price.

In *Leach v. Railroad Company,* 86 Mo. 27; 56 Am. Rep. 408, an agent to settle claims against the railroad had a contract for services for a fixed compensation. During said employment he made claims against the railroad for services as a notary.

The court held:

> "Whether these notarial services were distinct from and independent of, and not embraced in the plaintiff's contract of service, was a question of fact, to be determined, under proper instructions, from a consideration of all competent evidence that might be offered thereon by the parties."

In *Standard Plunger Elevator Co. v. Brumley,* 149 Fed. 184, the Circuit Court of Appeals for the Third Circuit held that:

> "Where in an action for agent's services in the sale of certain machinery, plaintiffs claim for additional services rendered to defendant in the performance of certain contracts outside their general oral contract of agency, whether such extra services were incident to such contract, or whether they were independent thereof, was for a jury."

In the instant case, the agreement was in writing and specified the duties to be performed by defendant, all of which duties refer to the operation of steamers already built and exclude, impliedly, the duty to furnish or build the new steamers. The specifically enumerated duties of defendant, referring to the securing of cargoes for the steamers of the line and the doing of acts related to such cargoes, are sufficient, in our opinion, to have entitled defendant to an instruction to the jury that, as a matter of law, defendant had no duty to purchase or construct new steamers for the line without compensation; but at this point we contend that, after striking the definition of defendant's duties from the agreement, and assuming the contract to impose upon defendant all the duties implied in a general agent appointed for the operation of the steamship line, still the question, whether the services of purchasing and building new steamers were incident to such a general contract of agency or not, was primarily a question for the jury.

What is usual and necessary for an agent to do in connection with the business in question is a question for the jury.

*Hartford & N. Y. Transp. Co. v. Plymer,* 120 Fed. 624 (C. C. A., 2nd Circ.).

The mere fact that one is found to be a general agent justifies neither court nor jury in guessing that given acts are within the scope of his authority or duty.

*Gore v. Canada Life Ass. Co.,* 119 Mich. 136.

---

**THIRD: THE CONSTRUCTION OF THE AGREEMENT IN CONNECTION WITH OUTSIDE SERVICES: DEFENDANT IS ENTITLED TO REASONABLE COMPENSATION THEREFOR.**

**A. Analysis of the scope of defendant's duties.**

1. The agreement is with regard to A/S Baja California.

2. The Baja California was a steamship line to operate between Mexican and Central American ports, and the West Coast of the United States as well as British Columbia.

3. For this steamship line defendant was to perform services as follows:

(a) "act as general agent with authority to appoint subagents, when required, for securing cargo northbound and southbound".

(b) to "fix charters when sufficient inducements offer".

(c) to "make all necessary arrangements for docking and clearing of the steamers at the respective ports of call".

(d) "make contracts, at the lowest competitive rates, for tallying and stevedoring".

"I have nothing to do with the operation of the vessels, their outfitting, or their tackle, furniture or repairs, or with the appointment of their masters, or the employment of their crews, or anything to do with the furnishing of provisions and stores, or with the preparation of proper certificates or surveys, or their insurance or management." (Testimony of Defendant, Record, p. 125.)

**B. Principles of construction:**

"The terms 'general agent' and 'special agent' are *relative.* An agent may have power to act for his principal in *all* matters. He is then strictly a 'general agent'. He may have power to act for him in particular matters. He is then a 'special agent'. But within the scope of such particular matters his powers may be general, and with reference thereto he is a 'general agent'."

*Springfield Eng. & Thresher Co. v. Kennedy,* 34 N. E. 856, 859 (Ind.).

**C. Application to the instant case:**

*First:* Defendant was not strictly a "general agent" for the steamship line. He had power to act for the steamship line, as a general agent, and the correlative duties of performing serv-

ices for it, only in relation to the securing of cargoes for the steamers, northbound and southbound, with the understanding that he, or the sub-agents, were to make contracts, at the lowest competitive rates, for tallying and stevedoring the cargoes. Within the scope of these particular matters his powers were general, and with reference to these particular matters only he was a "general agent". These matters referred to cargoes and contracts connected with cargoes. The services which he was to perform for the agreed compensation were all connected with the making of contracts relative to the securing, tallying and stevedoring of cargoes. All these services presupposed the existence of steamers ready to be used for the carrying of cargoes and were disconnected from the securing and operating of these steamers. The business of providing the ships, of manning and operating them was the business of plaintiff to be performed by himself or other agents, f. i. the masters of the steamers.

The additional special services to be performed by defendant, viz., "fixing charters when sufficient inducements offer" and "making all necessary arrangements for docking and clearing of the steamers at the respective ports of call"—in so far as they were services connected with the steamers of the line, also presuppose the providing of the steamers by the plaintiff and their operation by other

agents and are so clearly specific that they exclude any duty, on the part of defendant, of performing the service of purchasing, constructing or salving steamers for the plaintiff.

The foregoing are all the services which defendant was, by the agreement, to render for the agreed compensation. It follows that all other services, and in particular services rendered in procuring and maintaining the ships which were to carry the cargoes secured by defendant, were extra services.

*Second:* All services performed by defendant, which are *not* conditioned upon the previous existence of steamers ready for operation and earning freight, are *not* within the scope of defendant's duties under the contract, but are outside services for which he is entitled to compensation on a quantum meruit basis.

*Third:* Services in connection with the acquiring, building, managing, salving and repairing of any ships were not transactions within the scope of the duties contemplated by the agreement.

*Fourth:* In particular the services connected with the building of the steamers "Regulus" and "Romulus" were not services covered by the agreement, for the reasons that:

(a) these services were not "with regard to A/S Baja California". The "Regulus" was never used as a steamer of the Baja

California Line, running to "Mexican and Central American ports". In his "Report for the Year 1917, to the stockholders, plaintiff, the managing owner, says:

> "The ship, which was named the "Regulus", immediately commenced loading general merchandise in San Francisco, bound for *South American ports, as far as Valparaiso.* It brought back a full cargo of nitrate, and has since been running regularly between Puget Sound, San Francisco, and *South America.*"

(b) these services were not within the express or implied duties of defendant under the agreement, but were outside services to be reasonably compensated for.

*Fifth:* The services performed in connection with the purchase of the "Governor Forbes" were not within the express or implied duties of defendant under the agreement, but were outside services to be reasonably compensated for.

*Sixth:* The services performed in connection with the salving and repairing the "Sinaloa" were not within the express or implied duties of defendant under the agreement, but were outside services to be reasonably compensated for.

**D. The construction adopted by the trial court strikes out of the agreement the specification of defendant's duties:**

Only by striking 61 words out of the agreement does it become even plausible to make out of defendant a kind of general manager of the line, au-

thorized and obligated to build and purchase new steamers, and to salve steamers on the rocks. These 61 words are the words following directly after the words "as general agent" in the second paragraph of the agreement.

To produce this result it is necessary, not only to eliminate the 61 words mentioned, but also to mutilate the sentence in which the words "as general agent" occur by changing it from the form used in the agreement, viz.:

> "For the steamship line as aforementioned Mr. Smith is to act as general agent with authority to appoint subagents, when required, for securing cargo northbound and southbound"

to the following form:

> "For the steamship line as aforementioned Mr. Smith is to act as general agent."

Only by this process of amputation could defendant be converted from a general freight agent with limited powers and no control over the steamers into a general manager of the line with the power and duty to add to the steamers. No argument is required to show that the court was not justified in making a new contract for the parties by eliminating these words and disregarding their plain meaning.

**E. The practical construction placed upon the agreement by the plaintiff himself confirms the contention that defendant was to receive extra compensation for the services:**

1. "Romulus": Plaintiff recognized defendant's right to the commission of $10,000 for services rendered in the construction of the "Romulus" by making this sum an item of the price charged to the United States when the steamer was commandeered. It makes no difference, whether plaintiff has already received the $10,000 or is to receive them in the future; for the fact remains that, by making the charge, he recognized its propriety and lawfulness (Record, p. 93; Appendix, p. 28). In the event that he has already received this sum from the United States, the effect of the present judgment would be the unjust consequence that he would receive double payment, whereas defendant, who performed the service for which plaintiff charged, would receive nothing. Plaintiff has impliedly admitted that defendant's charge is just and should be estopped from now claiming that defendant has no right to a payment which he, plaintiff himself, claims the right to collect from the United States.

2. "Regulus": Plaintiff recognized defendant's right to the commission of $6000 for the services rendered in the construction of the "Regulus" by including this item in his report for the year 1917, to Pacific, Ltd., the corporation which owned this steamer. Having allowed this charge against the stockholders, plaintiff should now be estopped from

claiming that defendant had no right to make the charge which he, plaintiff, recognized as a proper charge against the stockholders (Record, pp. 79-81; Appendix, p. 10).

Furthermore: In a letter dated August 29, 1917, plaintiff wrote to defendant (referring to the account of June 1, 1917, containing the item: "Renumeration a/c Building S. S. Regulus, $6000"). "I have gone through your accounts enclosed in your letter of June 1st, and find same in order." (Record, pp. 71-72.)

**F. Defendant was entitled to reasonable compensation for the additional services.**

In *U. S. Mortgage Co. v. Henderson,* 111 Ind. 24; 12 N. E. 88, an attorney was employed as agent to negotiate and collect loans. Among others, he performed services in foreclosing mortgages and collecting moneys by legal proceedings; looking after repairs and caring for properties bought in at foreclosure proceedings; superintending repairs and taking general supervision of properties.

It was held:

1. That these were "services quite different from those comprised by the contract of agency".
2. That the principal was liable to pay a just and fair compensation.

The case of *Standard Plunger Elevator Co. v. Brumley,* supra, recognizes the principle that the additional services rendered by the agent may be

so independent of the services originally contracted for as to entitle him to extra compensation on a *quantum meruit* basis.

In *Ridley v. Sexton*, 18 Grant (U. C.) 580, the principal, engaged in the lumber business, engaged an agent and agreed to pay him a specified commission on all timber manufactured by the agent for the principal, which rate "included purchasing, superintending the making, and attending to the shipping of the same". The agent bought a quantity of timber for his principal, which was not manufactured under the superintendence of the agent.

It was *held* that he was entitled to a *reasonable compensation* for this service. The court said:

> "Notwithstanding he may be general agent for the subject matter covered by his contract, if he performs services for his principal, just exactly as he would perform the service for some one else, of value, and there arises under the facts an implication that it was to be compensated, there is not any reason under the law, why he should not receive that compensation."

In the instant case defendant was general agent for securing cargo only. Plaintiff was the general manager. The matter of the purchasing, constructing, repairing, and salving of the steamers was his business. The masters of the vessels were agents for matters connected with the navigation of the steamers.

The services referring to the "Regulus", "Romulus", "Governor Forbes" and "Sinaloa", were not, in their nature, of the same character as the services incident to the authority and duty of defendant under the contract.

There was, therefore, an implied contract to pay to defendant, in addition to the commission on freight, the reasonable value of the additional services rendered by him.

**G. Under its own construction of the contract the court erred in excluding evidence of a legal custom entitling defendant, as general agent of the line, to reasonable compensation, for the "Romulus", "Regulus", "Governor Forbes" and "Sinaloa" services.**

Defendant offered to prove a general and uniform custom to compensate general agents of steamship lines for services rendered in connection with vessels (such as the "Regulus", "Romulus" and "Governor Forbes" services), and in particular in connection with salvage services ("Sinaloa"), but the court sustained plaintiff's objections to all of defendant's questions bearing upon such custom and excluded all evidence thereof (Assignments of Error Nos. 6, 7, 8, 9, 10, 11, 12 (Appendix 35-36)

We deem it to be a settled principle of law that a legal custom to compensate an agent for performing extra services under a contract warrants the recovery of extra compensation.

*Mechem Agency,* Sec. 1522;
*U. S. v. Fillebrown,* 1 Pet. 28.

**FOURTH: THE CONSTRUCTION OF THE AGREEMENT RELATIVE TO COMMISSIONS ON FREIGHTS EARNED BY THE LINE OUT OF CARGO SECURED BY DEFENDANT, BUT COLLECTED BY THE LINE AFTER EXPIRATION OF DEFENDANT'S TERM OF AGENCY:**
**DEFENDANT IS ENTITLED TO SUCH COMMISSIONS.**

The following items of the bill of particulars belong to this category:

1. Commission on the Dupont de Nemours nitrate contract ..... $25,517.80
2. Commission on inward freight of "Governor Forbes" ..... 2,049.65
3. Commission on estimated freight earned by other steamers ..... 5,000.00

$32,567.45.

In all these cases the cargoes were secured by defendant before October 1, 1917, the date of termination of his agency. The freight money on the cargo thus secured during the term of defendant's agency was, however, not paid to the line until after the expiration of the term.

Defendant contends that he is entitled to the 5% commission on this freight under the contract.

In this connection it must be noted that the nitrate contract with Dupont de Nemours Company was originally made by defendant on his own behalf, and that defendant notified plaintiff that if he took it over, it would be subject to defendant's 5% commission. Plaintiff assumed the contract, carried the nitrate in his vessels, and collected an

amount of freight-money entitling defendant to $25,517.80 as a 5% commission on said amount.

The court denied all the instructions requested by defendant to the effect that defendant had a right to these commissions and, by directing a verdict in favor of plaintiff, ruled that defendant had no right to any of these commissions (Assignment of Errors Nos. 33, 34, 35, 36, 43, 44; Appendix, pp. 44-48).

---

The principal service to be performed by defendant in the course of his agency was the securing of cargoes for the steamers of the line. A subordinate and contingent service was the fixing of charters for the steamers (if advisable).

The compensation allowed in the agreement for these services was, correspondingly:

(I) "Commission of 5% *on all freight earned*" out of cargoes secured;

(II) "Commission of 2½% *on the freight earned*" out of charters secured.

This commission was "allowed" when the services were rendered.

*When* were the services rendered by defendant and his commission "allowed"? Obviously when, in the case of contracts of affreightment, the cargo was secured by the making of the contracts and when, in the case of charters, the charter was fixed. After that other agents of the line attended to the

further business connected with the steamers and cargoes down to the point when the freight money was paid; but defendant's business was finished, and his commission "allowed", *when the contract of affreightment was made by him.* Had the contract been that the commission was allowed on all "freight *received*", or on all "freight *collected*", or on all "freight *paid*", it would indicate an intention of the parties to allow to the agent a commission only on freight actually collected or received during the term of his agency; but the language used in the agreement: that the commission was allowed on all "freight *earned*" indicates an intention to make the commission independent of the time of the collection or payment of the freight.

> "To '*earn*' means '*to gain* as a just return or recompense by service, labor or exertion'."
>
> *Dayton v. Ewart,* 72 Pac. 40.

This is independent of the time of receipt or collection of the recompense; the recompense is earned when the person performing the labor *has gained the right to the recompense.*

"Freight earned", in the agreement, means, therefore: Freight gained by the steamship line, or which the line has a right to receive, as the result of defendant's service. On ALL such freight a commission of five per cent is expressly allowed. Whenever paid to the steamship company, this freight is earned by it, as the result of the service, labor and exertion of defendant.

It follows that defendant must be allowed the agreed commission on all freight which the steamship line acquired a right to collect in consequence of defendant's services.

This construction is confirmed by allowing the commission not only on "freight earned", but "on *all* freight earned", excluding the idea of any distinction between freight received at one time or another.

In *S. H. Greene & Sons v. Freurd,* 150 Fed. 721 (C. C. A., 2nd Circ.), plaintiff made a contract with defendant to act as its agent in procuring orders for the bleaching, printing and dyeing of cotton goods, in which business defendant was engaged. The contract provided that the plaintiff should receive a commission, to be paid on all the work secured by him. The Circuit Court of Appeals for the Second Circuit *held* that on the termination of plaintiff's agency he was entitled to recover from defendant commissions, not only on the work done prior to the termination of the agency, but also on all work called for by contracts secured by the agent, by the acceptance of his offers by customers.

In the instant case, as in the case cited, the commission agreed upon was compensation for work secured by the agent, viz, for the work of securing cargoes for the steamers of Baja California line. The business of the agent was not the earning of the freight, but the procuring of the contracts. When he had secured the cargoes by procuring the con-

tracts of affreighment, he was to be allowed the commission, as a reward of his service.

The quantum of the commission, the amount of his compensation, was to be figured out on the basis of a percentage "on all freight earned". The question was, therefore, simply: What freight was earned out of the cargoes secured by defendant? And the computation of the amount of the commission was made by calculating 5% "on all freight earned" out of cargoes so secured.

In *Singer Sewing Machine Co. v. Brewer,* 78 Ark. 202, a sewing machine agent was to receive a 15% commission on sales; there was a proviso that "all his claims therefor shall cease immediately upon the termination of this agreement". *Held,* the proviso does not apply to the 15% commissions earned, but not yet payable, when the contract of agency terminated.

This principle would hold even if the plaintiff had seen fit to have the shippers execute new written contracts for the transportation of the cargoes.

*Merriman v. McCormick Harv. Mach. Co.,*
71 N. W. 1050 (Wis.).

The construction here contended for accords with the general proposition that the agent is entitled to his compensation when he has fully completed his undertaking according to its terms. The inquiry in every instance must be: 1. What did the agent undertake to do? 2. Has he done it?

*Mechem, Agency,* Sec. 1532.

In the instant case defendant undertook to secure cargoes for the steamers of the "Baja California" line, and he did secure them. When he had done this, he was to be allowed, and was entitled to, his commission. To compute the amount of this commission, it was necessary to determine the total amount of all freight earned on the cargoes secured by defendant and to allow to defendant 5% of this total amount.

---

IN CONCLUSION.

It is respectfully submitted that the court erred in denying to defendant all compensation for services rendered in connection with the construction of the steamers "Regulus" and "Romulus", and the purchase of the steamer "Governor Forbes", and the salving and repairing of the steamer "Sinaloa", and in denying to defendant all compensation for securing the nitrate cargoes of Dupont de Nemours Company, and the inward cargo of the "Governor Forbes", and the cargoes on which freight was paid after October 1, 1917.

On the grounds stated the judgment of the District Court should be reversed.

Dated, San Francisco,
May 16, 1921.

Respectfully submitted,
ANDROS & HENGSTLER,
GOODFELLOW, EELLS, MOORE & ORRICK,
*Attorneys for Plaintiff in Error.*

(APPENDIX FOLLOWS.)

# Appendix.

## Index to Appendix.


Page

I. No verdict for a greater sum than the sum total of the items of the bill of particulars, viz., $58,532.75, is justified under the pleadings 1

(a) Quotations from and references to record relative to assignments of error..... 1

(b) Defendant contends that the court erred in directing a verdict in excess of plaintiff's claim by the sum of $12,050 and in entering judgment against defendant on said verdict..... 2

(c) Assignment of error as to $12,050 not specified in Bill of Particulars..... 2

II. "Regulus": the charge of $6000 for contracting and superintending her construction..... 4

(a) Quotations from and references to the record 4

(b) In his annual report made as president of the corporation which owned the "Regulus", the plaintiff admitted the correctness of this $6000 charge by the defendant..... 5

(c) The agency contract between the plaintiff and the defendant was in respect to certain specified duties to be performed by the defendant in respect to appointing sub-agents and procuring freight for vessels of the Baja California Company. The "Regulus" was never owned by that company, and it is immaterial that plaintiff intended to put her in the same business as the "Baja California" vessels..... 11

(d) The defendant should have been permitted to show that plaintiff allowed him to purchase stock only to the extent of $3000 out of the total of $450,000 in the Pacific Limited..... 17

(e) Assignments of Error as to "Regulus" item.. 22

Page

III. THE COMMISSION FOR CONTRACTING AND SUPERVISING THE "ROMULUS"—$10,000 ..... 25
(a) Quotations from, and references to, the record relating to assignments of error ..... 25
(b) Assignments of Error as to "Romulus" item .. 25

IV. COMMISSION PURCHASE "GOVERNOR FORBES"—$6000 30
(a) References to record relating to assignments of error ..... 30
(b) Assignment of errors as to commission on purchase of "Governor Forbes" ..... 31

V. "SINALOA" SALVAGE ACCOUNT—$3165.27 ..... 32
(a) Quotations from and references to the record relating to assignments of error ..... 32
(b) Assignments of Error as to "Sinaloa" salvage item ..... 38

VI. COMMISSION DUPONT CONTRACT—$25,517.80 ..... 43
(a) References to record relating to assignments of error ..... 43
(b) Assignments of error as to commission on Dupont contract ..... 44

VII. BALANCE ESTIMATED FREIGHT EARNINGS—$5000 .... 47
(a) Reference to record in connection with assignments of error ..... 47
(b) Assignments of error as to commission on freight booked prior to October 1st ..... 47

VIII. COMMISSION ON INWARD FREIGHT "GOVERNOR FORBES" —$2049.65 ..... 48
(a) Reference to record in connection with assignments of error ..... 48
(b) Assignments of error as to commission on inward freight "Governor Forbes" ..... 48

## Appendix

## Containing Quotations from and References to the Pages of the Record.

---

### I. NO VERDICT FOR A GREATER SUM THAN THE SUM TOTAL OF THE ITEMS OF THE BILL OF PARTICULARS, VIZ., $58,532.75, IS JUSTIFIED UNDER THE PLEADINGS.

**(a) Quotations from and references to record relative to assignments of error.**

The items specified in the bill of particulars are:

| | |
|---|---|
| Charge for Hull 154 ("Romulus") | $10,000.0 |
| Commission Dupont Powder contract | 25,517.80 |
| Commission inward freight "Governor Forbes" | 2,049.65 |
| Commission purchase "Governor Forbes" | 6,800.00 |
| "Sinaloa" salvage account | 3,165.27 |
| Balance estimated freight bookings | 5,000.00 |
| Charge for superintending construction of "Regulus" | 6,000.00 |
| Total | $58,532.72 |

(Record, pp. 6 and 9.)

The above mentioned items are referred to in two letters which are incorporated in the bill of particulars. The bill of particulars then states:

> "That the items stated in said two letters, *plus $12,050, for the details of which we have sent to Christiania* * * * are the items which constitute the bill of particulars * * * *upon which* this complaint is based."
>
> (Record, pp. 9-10.)

| | |
|---|---|
| The complaint alleged that defendant had collected for plaintiff's account | $70,582.72 |
| The bill of particulars specifies | 58,532.72 |
| Balance unspecified | $12,050.00 |

The directed verdict was for the amount of $70,582.72 (and interest), being $12,050 in excess of aggregate claim specified in bill of particulars.

One of the letters quoted in the bill of particulars also contained an item of $3119.12 on account of overpayment of freight upon the Dupont contract, but the correctness of this item was conceded near the end of the bill (Record, p. 10).

**(b) Defendant contends that the court erred in directing a verdict in excess of plaintiff's claim by the sum of $12,050 and in entering judgment against defendant on said verdict.**

**(c) Assignment of error as to $12,050 not specified in bill of particulars.**

*Assignment of Error No. 23*:

"In sustaining plaintiff's objection to the following question propounded by defendant to the witness, C. Henry Smith:

> 'Q. Now, as a matter of fact, Mr. Smith, so far as you can tell at the present time what are the disputed items, or the amount of them'?"
>
> (Record, p. 237.)

*Assignment of Error No. 24*:

"In sustaining plaintiff's objection to the following question propounded by the defendant to the witness, C. Henry Smith:

> 'Q. I will ask you to state whether Mr. Linvig, or any one else connected with the plaintiff in this case, or anyody else, has ever stated to you what the item of $12,050 has reference to which is mentioned in the bill of particulars filed by the plaintiff in this case, and as to which it is therein stated that they are sending to Christiania for details'?"

(Record, pp. 215, 237.)

*Assignment of Error No. 25*:

"In sustaining plaintiff's objection to the offer in evidence of the following cablegram relating to stock in the corporation owning the "Regulus" from the defendant to the plaintiff, dated January 11, 1916:

> 'Stock accepted; letter twenty-first December'."

(Record, pp. 216, 238.)

*Assignment of Error No. 46*:

"In refusing to give instruction No. 16, requested by the defendant, and reading:

> 'The court instructs the jury to find in favor of the defendant as to the item of $12,050 referred to in plaintiff's bill of particulars, for the details of which it is therein stated that the plaintiff has sent to Christiania'."

(Record, pp. 22, 246.)

## II. "REGULUS": THE CHARGE OF $6000 FOR CONTRACTING AND SUPERINTENDING HER CONSTRUCTION.

### (a) Quotations from and references to the record.

On December 23, 1915, defendant entered into a contract with a San Francisco shipbuilding firm for the construction of the "Regulus" at the contract price of $450,000 (Record, p. 34). Although authorized by plaintiff's cables to enter into this contract (Record, pp. 28-29), defendant assumed the responsibility of executing the contract in his own name.

> "I did this because my principal was a foreigner, and the United Engineering Company wanted my name on the contract."
>
> (Record, p. 33.)

That the services rendered by the defendant in securing and entering into this contract for the construction of the "Regulus" were of very great value to the plaintiff, is a fact which cannot be denied. The two vessels contracted for by the defendant as the agent of the plaintiff were the "Regulus" and the "Romulus". The "Regulus" contract was executed on December 23, 1915, and the "Romulus" contract on September 15, 1916 (Record, pp. 34, 82). They were sister ships of the same tonnage and specifications (Record, p. 91). The contract price of the "Regulus" was $450,000, while the contract price of the "Romulus" was $775,000.

"The difference in these contract prices was due to the rising value of materials during the interval."

(Record, p. 91.)

That the defendant devoted a great deal of time to the general supervision of the construction of these vessels, is also undisputed. Both of them were built on the Oakland Estuary, and the defendant's offices were in San Francisco.

"All of the time that these vessels were building I had to go over there and be in conferences with the inspectors and to watch the specifications so it took a great deal of my time."

(Record, pp. 81-82.)

**(b) In his annual report made as president of the corporation which owned the "Regulus", the plaintiff admitted the correctness of this $6000 charge by the defendant.**

To own and operate the "Regulus" the plaintiff formed a separate corporation, which is known as "The Pacific Limited". The "Baja California" and the "Sinaloa", the two vessels built at Sunderland, England, were owned and operated by the "Baja California" Company.

The defendant testified:

"The 'Regulus' made her first outward voyage in April and all the vouchers were in and the account closed by June 1st, 1917. In my statement of account with Mr. Lindvig dated June 1st, 1917, I included the following item 'Remuneration account building steamship "Regulus" $6000'."

(Record, pp. 66-67.)

On July 18, 1917, the plaintiff wrote the defendant acknowledging receipt of the letter and account of June 1st and in respect to the "Regulus" item his letter reads:

> "Your statement of first June. As far as I can see hitherto, there is no voucher concerning the item 'Remuneration account "Regulus" $6000'. Please explain same."
>
> (Record, p. 71.)

In reading this correspondence the delays in the mail existing at that time should be kept in mind. The defendant testified that the above mentioned letter dated July 18, 1917, was not received by him until October 15, 1917 (Record, p. 70).

On August 28, 1917, the plaintiff wrote the defendant a letter reading in part as follows:

> "I have now gone through your accounts enclosed in your letter of June 1st, and find same in order with the exception of following items in the general statement dated June 1st:
>
> Rebalance from s/s 'Sinaloa' voyage 8 is transferred with the amount of $41,699.41
>
> While the statement says 40,611.99
>
> Which makes a difference in your favor of $1,087.42."
>
> (Record, pp. 71-72.)

> "As formerly told you, there was no voucher regarding remuneration a/c building SS 'Regulus' $6000."
>
> (Record, p. 72.)

On November 8, 1917, the defendant wrote the plaintiff a letter reading in part:

> "STATEMENT FIRST OF JUNE.
>
> "Regarding this voucher, we have sent you one as far as I remember and it is for attending to contract, making payments and keeping books for this vessel and also for protecting the contract."
>
> (Record, pp. 73-74.)

The defendant testified:

> "I do not remember whether I sent a voucher for the $6000.00 as part of the remuneration building of the steamship 'Regulus' with my statement of June 1st, but I sent a voucher afterwards."
>
> (Record, p. 73.)

The plaintiff had organized the Pacific Company to own the "Regulus", and as the president and general manager of the company, he doubtless desired a voucher or receipt signed by the defendant to represent the $6000 which the defendant then sent him.

On April 11, 1918, plaintiff sent out a written report to the stockholders (Record, pp. 77-78), covering the operation of the "Regulus" from the date of its completion to the end of 1917, and notifying them that:

> "The annual stockholders' meeting will take place at my office, Thursday, April 25th, at 1 P. M."
>
> (Record, p. 80.)

This report recognizes defendant's commission as a part of her construction cost, and reads:

"Report for the Year 1917—(4/1—12/31).

"The company 'Pacific' Limited, was established at a meeting of November 23, 1916, with a capital of Kr. 950,000.00 paid in full, in order to purchase the contract for a 6000 ton steamer built at the Union Iron Works, San Francisco, at a price of $450,000.00, for delivery in December, 1916.

"As the ship was contracted for a single decker, an additional sum had to be paid for furnishing a tween deck. Wireless telegraph as well as various other extras were also arranged for. *The total cost of the ship was Kr. 1,856,329.41.*

"To cover the amount a 5½% loan of Kr. 600,000.00 was obtained from the Sorske Skibs Hypothenkbank for a mortgage on the ship. The balance was covered by cash credit in Andresens Bank a/s.

"The delivery of the ship was somewhat delayed (partly on account of strikes), and it was not taken over until April, 1917. The builders paid $10,000.00 as a compensation for the late delivery.

"The ship, which was named the 'Regulus', immediately commenced loading general merchandise in San Francisco, bound for South American ports, as far as Valparaiso. It brought back a full cargo of Nitrate, and has since been running regularly between Puget Sound, San Francisco and South America.

"The voyages have been made without any serious accidents, and the ship has completed 2½ round trips during the three quarters of a year it has been running.

"C. Henry Smith acted as Agent in San Francisco until October 1, 1917, when the A. O.

Lindvig Company established their own office in the City.

"The freight rates southbound increased considerably during the year, especially the last months: for instance, the freight amount for southbound trip in September amounted to $147,000.00 against $178,000.00 in December, and there is at the present time apparently no sign of a decrease in the rates.

"For the northbound voyages the ship has been on a contract for $13.75 per ton on Nitrate to San Francisco, with a small additional payment for discharging up north. The contract will expire about May, 1918, and thereafter we can expect a raise on these rates also.

"A dispute has unfortunately arisen with the former agent, C. Henry Smith, as Mr. Smith withheld about $52,000.00 of the collected freight, to cover various commission charges, which we consider him absolutely not entitled to. The dispute will probably be settled this summer.

"As shown by the following statement, the ship has earned a total freight of Kr. 2,033,983.36, with a net profit of Kr. 1,096,420.32. After deducting interest charges, registration fee, etc., the money at disposal amounts to Kr. 1,012,346.65, which will be disposed of as follows:

| | |
|---|---|
| Written off on the ship | Kr. 256,329.41 |
| Reserved for boiler & survey funds | 100,000.00 |
| Reserved for taxes for 1917 | 350,000.00 |
| 30% dividend to the shareholders | 255,000.00 |
| carried into new account | 51,017.24 |
| | Kr. 1,012,346.65 |

"The 30% dividend was given on January 2nd, this year.

"Due to the low exchange on dollars, the money has not been transferred to Norway, but deposited in a San Francisco bank. At the end of the year this deposit amounted to $284,-812.83. At the same time we had debts in the Andresens Bank A/S, amounting to Kr. 560,-422.31. The mortgage has been reduced with 5%, viz, Kr. 30,000.

"The annual stockholders' meeting will take place at my office Sjofartsbygningen, Thursday, April 25, at 1:00 P. M.

Kristiania, April 11, 1918.

A. O. Lindvig.

---

Cost of the S.S. REGULUS'.

| | |
|---|---|
| Contract price $450,000.00 | Kr. 1,630,500.00 |
| Putting in tween decks, various extras and improvements outside the contract Kr. 204,229.41 | 204,229.41 |
| COMMISSION FOR CONTRACTING THE SHIP, CHARGED BY C. HENRY SMITH $6000 | 21,600.00 |
| | 1,856,329.41" |

(Record, pp. 79-81.)

Apparently plaintiff was not then aware of the fact that his local representatives had challenged defendant's right to retain this commission of $6000.00. Plaintiff's report to the "Pacific Limited" stockholders was dated April 11, 1918. The complaint in this action was filed December 15, 1917. The complaint was verified by B. Lindvig, the son of plaintiff, who had been in San Francisco since the fall of 1916.

It is apparent from plaintiff's report to the stockholders of the "Pacific Limited" that he himself concedes defendant's right to this commission, and has already charged it against the construction of the "Regulus".

The plaintiff presumably advanced the money for the construction of this vessel, as the vessel was contracted on December 23, 1915, and the "Pacific Limited", according to the plaintiff's reports to its stockholders, "was established at the meeting of November 23, 1916". This report states "the total cost of the ship was 1,856,329.41 Krs." Included within the items comprising this 1,856,329.41 Krs. is the defendant's charge of $6000.00. The effect of the verdict directed against the defendant is, that the plaintiff keeps this $6000.00 which he represented to the stockholders had been paid to the defendant.

**(c) The agency contract between the plaintiff and the defendant was in respect to certain specified duties to be performed by the defendant in respect to appointing sub-agents and procuring freight for vessels of the Baja California Company. The "Regulus" was never owned by that company, and it is immaterial that plaintiff intended to put her in the same business as the "Baja California" vessels.**

> "Mr. A. O. Lindvig, of Christiania, and Mr. C. Henry Smith of San Francisco have this day made the following agreement *with regard to A/S Baja California,* a steamship line, to operate steamers between Mexican and Central American Ports and the West Coast of the United States as well as British Columbia.

"For the steamship line as aforementioned Mr. Smith is to act as general agent with authority to appoint subagents, when required, *for securing cargo* northbound and southbound, *fix charters* when sufficient inducements offer, as well *make all necessary arrangements for docking and clearing of the steamer at the respective ports of call.*

"It being also understood that the general agent or subagents *are to make contracts,* at the lowest competitive rates, *for tallying and stevedoring.* On all freight earned a commission of five per cent is to be allowed Mr. Smith, including any allowance or allowances made to subagents—besides this remuneration an allowance per steamer is to be made to cover incidentals, stamps and other disbursements and for travelling expenses, as required, subject to special agreement.

"*In the event any steamer or steamers of the A/S Baja California* are fixed by Mr. Smith for other voyages than as hereinbefore mentioned, or on time charter, a commission of 2½ per cent on the freight earned is allowed.

"This agreement is to remain in force for a period of three years, provided the line referred to above is maintained so long.

"Christiania, 29th June, 1914.

(Sgd.) A. O. Lindvig,
(Sgd.) C. Henry Smith."

("A/S" stands for corporation.)

(Record, p. 26.)

As is plainly evident from the terms of this freight agency contract, the contracting for, and the superintending of *construction* of vessels by the defendant is not included within the compensation or duties mentioned in the contract, even though built for the "Baja California" Company, or even

if intended to be put into service with the vessels of the "Baja California" Company.

Respecting his duties under the agency contract, the defendant testified:

> "I have nothing to do with the operation of the vessels, their outfitting, or their tackle, furniture, or repairs, or with the appointment of their masters, or the employment of their crews, or anything to do with the furnishings of provisions and stores, or with the preservation of proper certificates, or surveys, or their insurance, or management."
>
> (Record, p. 125.)

In point of fact, the "Regulus" was never owned by the "Baja California" Company.

On December 10, 1915, eight days before the construction contract was signed the plaintiff wrote the defendant a letter, reading in part:

> "I note you are willing to take interest for $100,000 and that others are also inclined to take some stock, but as I have not yet made up my mind if the steamer is going to enter the Baja California, I shall write you later on this subject.
>
> (Record, p. 30.)

On December 21, 1915, two days before the construction contract was signed the plaintiff wrote the defendant a letter, in part reading:

> "I have decided not to let this vessel go into the 'Baja California' Company, but to form a new company, which I have thought of naming the Joint Stock Company, Pacific."
>
> (Record, pp. 52-53.)

At the time of the execution of the agency agreement the "Baja California" Company was "to operate steamers between *Mexican and Central American ports* and the west coast of the United States as well as British Columbia" (Record, p. 26).

In his report for the year 1917 to the stockholders plaintiff states:

> "The ship, which was named the 'Regulus', immediately commenced loading general merchandise in San Francisco, bound for *South American ports, as far as Valparaiso.* It brought back a full cargo of nitrate, and has since been run regularly between Puget Sound, San Francisco and *South America.*"
>
> (Record, p. 79.)

When the vessel was nearing completion, the question arose as to whether or not the Shipping Board would permit her ownership by a Norwegian corporation. The plaintiff was very desirous that the ownership of the vessel be transferred to the ownership of the "Pacific Limited", which was a Norwegian corporation, and wrote a letter to this effect to the Norwegian Legation at Washington (Record, p. 62).

On March 8, 1917, the defendant cabled the United States Shipping Board as follows:

> "United States Shipping Board,
> Munsey Building, Washington, D. C.
> In December, nineteen fifteen, a contract was entered into between undersigned and United Engineering Works for the construction and sale of a steel steamer Regulus stop. Under-

signed was acting solely as agent for A. O. Lindvig of Norway, who furnished the money for the purchase, the contract having been made in his behalf and confirmed by him stop. The ship is practically completed and is advertised for sailing to *South America* on Thursday next, all cargo having been booked and much of it having arrived in San Francisco ready for shipment stop. Norwegian Counsel stands ready to give Norwegian temporary registry stop. Since ship owned by Norwegian and neither enrolled, licensed or registered American am advised by consul that Shipping Act does not apply stop. However, in order that no possible misunderstanding later, we hereby explain transaction stop. Simply desire to know that no objection by Board to completion of contract by final payment to builder by undersigned for Lindvig and delivery to Lindvig of formal bill of sale so that vessel can get away stop. Any delay beyond that time means loss of more than two thousand dollars daily stop. May we ask for reply at your earliest convenience.

C. Henry Smith, Inc."

(Record, p. 56.)

On March 29, 1917, the following telegrams were exchanged between the defendant and the United States Shipping Board:

"March 29, 1917.

"United States Shipping Board,
Munsey Building, Washington, D. C.

"In consideration of the United States Shipping Board having waived any and all right to purchase, under section nine of the United States Shipping Act of September seven, nineteen sixteen, the steamer Regulus, now in the port of San Francisco, California, and having

also granted and approved the sale and transfer of said steamer to A. O. Lindvig of Christiania, Norway, said A. O. Lindvig does hereby agree with said United States Shipping Board that said steamer Regulus will make three consecutive round trip voyages from said San Francisco or from other American port or ports on the Pacific Coast of North America, to port or ports *on the west coast of South America*, and that the first of said round trip voyages will be commenced within twenty-one days from date.

A. O. Lindvig,
By C. Henry Smith, Inc.,
Agent."

"We guarantee that the above agreement will be carried out by the 'Regulus'.

C. Henry Smith, Inc."

"March 29, 1917.
San Francisco, Cal.

"C. Henry Smith, Inc.

"In consideration of owner of Regulus entering into agreement offered in your telegram of March twenty-eighth, Shipping Board waives any right it may have to purchase Regulus under provisions sections nine shipping act; prepare agreement and forward same to board. Board looks to your personal assurance of its performance as much as to terms of contract.

"Shipping Board."

(Record, pp. 62-63.)

It thus appears that not only did the defendant assume a personal responsibility for $450,000.00 by signing the contract for the construction of the vessel as the principal, but in order to carry out the plaintiff's wishes that she remain in private ownership, the defendant gave his personal guarantee

that if the Government permitted the transfer to the Norwegian corporation she would make at least three voyages between the Pacific Coast ports of North America and the West Coast of South America, from where she was returning with nitrate cargoes consigned to the Dupont Company (Record, p. 111).

**(d) The defendant should have been permitted to show that plaintiff allowed him to purchase stock only to the extent of $3000 out of the total of $450,000 in the Pacific Limited.**

While it may be true that it is largely immaterial whether the defendant was or was not permitted to acquire any stock interest in the Pacific Limited, yet it seems to us that as one of the circumstances bearing upon his right to compensation for her construction, it was pertinent to show that the plaintiff treated the defendant's request to subscribe for $100,000 worth of stock wholly as a matter of favor, and finally allowed the entire subscription by the defendant and Dupont officials only to the extent of $54,000, with the result that the defendant was only allowed to obtain stock to the amount of $3000 for himself the balance of the $54,000 going to the United Engineering people (Record, p. 114).

On November 30, 1915, the defendant cabled the plaintiff:

> "Have option six thousand (6000) tonner United Engineering Works here model and arrangement like steamer Sverre and oil burner, delivery within twelve months, four hundred

and fifty thousand dollars, tween deck and electric light fifteen thousand extra. I can guarantee one hundred thousand dollars subscription of stock this city, if wanted, and further subscription South American builders have option steel only few days so please telegraph quickly if interested."

(Record, p. 27.)

On December 6, 1915, defendant cabled plaintiff:

"Six thousand tonner lowest price account steel now advanced and mills busy two years guaranteed speed nine knots. Will subscribe hundred thousand dollars stock. Some of Dupont officials will also take shares."

(Record, p. 28.)

On December 10, 1915, plaintiff wrote the defendant:

"I note, you are willing to take interest for $100,000—and that others are also inclined to take some stock, *but as I have not yet made up my mind if the steamer is going to enter the 'Baja California' Company, I shall write you later on this subject.*"

(Record, p. 30.)

On December 14, 1915, defendant wrote plaintiff:

"We are prepared to arrange for subscription of stock in this steamer to the extent of $100,000.00, as advised in the cables and we should therefore like to know at an early date the name of the company and how these subscriptions should be made."

(Record, p. 33.)

On December 21, 1915, plaintiff wrote defendant:

> "*I have decided not to let this vessel go into the* 'BAJA CALIFORNIA' *company, but to form a new company, which I have thought of naming the joint stock company 'Pacific'.* I enclose copy of subscription circular, from which you will note that the joint capital is placed at Kr. 850,000—as a mortgage loan will be raised for the rest of the purchase price. The value of the shares will be Kr. 5000 each. Up to the present has been subscribed Kr. 635,000. And I have therefore for the present reserved for you an amount of up to Kr. 200,000, and will be obliged for your telegraphic reply upon receipt hereof, if you are considered included herewith."
>
> (Record, p. 53.)

The 200,000 crowns which the plaintiff stated that he had reserved for the defendant was then the equivalent of approximately $54,000 of our money (Record, p. 54).

> "Q. You have stated in your telegram to him that you would subscribe $100,000.
>
> A. Yes.
>
> Q. But he did not reserve but about $54,000.00 to you? A. Yes.
>
> Q. Now on January 11, 1916, did you send Mr. Lindvig a cablegram of which this is a copy?
>
> Mr. FRANK. The same objection, immaterial; it has nothing to do with this transaction.
>
> The COURT. The objection is sustained, Mr. Moore; it is wholly immaterial now.
>
> "The court thereupon sustained said objection, to which ruling counsel for the defendant duly excepted, and said exception is specified and designated
>
> Exception Number One.

"The cablegram of January 11, 1916, from the defendant to the plaintiff, and which was referred to in the question to which the objection was sustained, read:

'Statsraad Lindvig,
Kristiania (Norway).

'STOCK ACCEPTED LETTER TWENTY-FIRST DECEMBER SINALOA SAILED TWENTY-FOUR HUNDRED THIRTY TONS.

SMITH'.

(Record, p. 54.)

"The defendant then offered the following cablegrams received by him from the plaintiff:

'January 19, 1916.

'If you don't wish to overtake full amount two hundred thousand Kroner Pacific, I can dispose of about one hundred thousand here please telegraph'.

"At the same time the defendant offered a cablegram by him to the plaintiff in reply to the foregoing from plaintiff. This last mentioned cablegram read:

'January 19, 1916.

'Cannot give up any of two hundred thousand Kroner stocks writing'.

"Counsel for the plaintiff thereupon objected to the introduction of the above mentioned telegram as being immaterial.

"The court sustained said objection, to which ruling the counsel for the defendant duly excepted, and said exception is designated

Exception Number Two."

(Record, p. 55.)

That the defendant only received three shares of stock, by reason of plaintiff's cutting down the amount of subscription to be allowed defendant

and the Dupont Powder people is indicated by the following question and answer:

> "Q. The stock that these friends of yours subscribed for, and the three shares that you got had not been received by you at this time? A. No."
>
> (Record, p. 58.)

All of the remainder of the $54,000 had to be delivered over by the defendant to the United Engineering people (Record, p. 114).

The correspondence and the excluded cablegrams relating to requests by defendant on behalf of himself and others to subscribe for stock in the "Regulus", indicate fully that he was contracting for the vessel and was supervising her construction, as the *representative* of the defendant, and that the plaintiff understood that the defendant was building the vessel not as an officer of the Baja California Company at all. This correspondence shows that the services were being performed by the defendant for the plaintiff, with the realization that the plaintiff *as an individual* was the principal in the matter. The plaintiff advised the defendant that he was not going to turn the vessel over to the Baja California Company, but that he was going to form the Pacific Limited to own and operate her. When the defendant expresses a willingness to subscribe for $100,000 worth of stock, the plaintiff did not hesitate to cut down a possible subscription by the defendant and those associated with him down to $54,000, without any inquiry as to what amount

this reduction would enable the defendant himself to acquire, because of possible commitments to others by the defendant at a time when his understanding was that the plaintiff was willing that the defendant and others referred to by the defendant might be permitted to acquire $100,000 worth of stock.

The "Regulus" was not built for the "Baja California" Company, and the plaintiff did not recognize any right in the defendant to subscribe for stock in connection with her ownership. The mere fact that plaintiff did not recognize defendant's right to participate in her ownership is a circumstance indicating that the defendant was to be compensated directly for his services.

The defendant's services in contracting for and supervising the construction of this vessel were outside any services to be performed by him as the freight agent of the "Baja California" steamers. The defendant was treated by the plaintiff as not having any *right* even to purchase stock in the company which owned her. Why, then, and under what theory, is the defendant to be denied compensation for his services in contracting and supervising her construction?

**(e) Assignments of error as to "Regulus" item.**

*Assignment of Error No. 1:*

In sustaining plaintiff's objection to the following question propounded by defendant to the witness C. Henry Smith:

"Q. What was the market value of the 'Regulus' at the time she was completed, on the first day of April, 1917?"

(Record, p. 229.)

*Assignment of Error No. 3:*

In sustaining plaintiff's objection to the following (183) question propounded by defendant to the witness C. Henry Smith:

"Q. I will ask you to state whether or not Mr. Lindvig at any time claimed that you were not entitled to your commission on the 'Regulus' until the time that he filed this suit?"

(Record, p. 229.)

*Assignment of Error No. 4:*

In sustaining plaintiff's objection to the following question propounded by defendant to the witness C. Henry Smith:

"Q. I will ask you to state whether or not Mr. Lindvig at any time either said to you verbally or in writing that you were not entitled to your commission on the 'Regulus' prior to the first day of December, when a question was raised in regard to that matter in a letter written by Mr. Frank, which is carried into the bill of particulars?"

(Record, p. 229.)

*Assignment of Error No. 25:*

In sustaining plaintiff's objection to the offer in evidence of the following cablegram relating to stock in the corporation owning the "Regulus" from the defendant to the plaintiff, dated January 11, 1916:

"Stock accepted letter twenty-first December."

(Record, p. 238.)

*Assignment of Error No. 26:*

In sustaining plaintiff's objection to defendant's offer in evidence of the following cablegram from the plaintiff to the defendant, dated January 19, 1916, and relating to stock in the corporation owning the "Regulus":

> "If you don't wish to overtake full amount two hundred thousand Kroner Pacific I can dispose of about one hundred thousand Kroner here please telegraph."
>
> (Record, p. 238.)

*Assignment of Error No. 48:*

In refusing to give instruction No. 17, requested by the defendant, and reading:

> "I charge you that the agency contract entered into by and between A. O. Lindvig and C. Henry Smith on June 29, 1914, had sole reference to C. Henry Smith acting as the agent for the 'A/S Baja California' in the operation of steamers between Mexican, Central America, West Coast of United States, and British Columbia ports; and I instruct you that the services rendered by C. Henry Smith in contracting for, and supervising the construction of the 'Romulus' and 'Regulus', and in purchasing the 'Governor Forbes', were not included within his duties as agent under said contract of June 29, 1914."
>
> (Record, p. 247.)

*Assignment of Error No. 49:*

In refusing to give instruction No. 23, requested by the defendant, and reading:

> "I instruct you that it is not necessary for the defendant (194) to prove an express promise

by the plaintiff to compensate the defendant for his services in connection with the contracting and building of the 'Regulus' and 'Romulus'. It is sufficient for the defendant if he proves in this behalf that the services rendered by him in connection with the contracting and building of said vessels were outside of the scope of his duties under the agency contract of June 29, 1914, and that his services in connection with the contracting and building of said vessels were beneficial to the plaintiff, and were of such a nature, and rendered under such circumstances as to imply a promise upon the part of the plaintiff to pay for such services."

(Record, p. 247.)

---

### III. THE COMMISSION FOR CONTRACTING AND SUPERVISING THE "ROMULUS"—$10,000.

**(a) Quotation from and references to the record relating to assignments of error.**

On September 15, 1916, the defendant, "as representing A. O. Lindvig of Christiania, Norway", entered into a contract with the Union Iron Works for the construction of a 6000-ton vessel for $775,000 (Record, p. 82).

Defendant had been working on the matter of securing such a contract since December, 1915, and between December, 1915, and September, 1916, had obtained various options for the building of similar vessels by different yards about the bay.

"Between December, 1915, and September, 1916, I obtained a number of options for Mr. A. O. Lindvig for the building of 6000 ton vessels by various yards here, and we finally came

> to the conclusion of closing this contract for the construction of Hull 154 as the 'Romulus' was called during the time of her building."
>
> (Record, p. 81.)

This vessel was also built in the Oakland estuary, and a considerable amount of defendant's time was occupied in going over to where the vessel was being built and conferring in regard to the carrying out of the plans (Record, p. 81).

With respect to the "Romulus" the defendant also indicated to the plaintiff that he would like to be permitted to subscribe for some stock; but was finally informed by the plaintiff that the latter had decided to keep the vessel entirely to himself and not form any company to take over her ownership.

On September 13, 1916, just two days prior to entering into the contract for the construction of the "Romulus", the defendant cabled plaintiff:

> "New contract 6000 tonner eventually stock desired about $50,000."
>
> (Record, p. 92.)

On July 16, 1917, the defendant cabled the plaintiff:

> "Have you decided regarding fifty thousand dollar stock I asked you to reserve September last year second new building stop. Please let me have the information now, as it is of importance to me. Smith."
>
> (Record, p. 76.)

On July 20, 1917, the plaintiff cabled the defendant:

"No decision stock second new building, *but shall probably keep the boat myself.*"

(Record, p. 76.)

The defendant further testified:

"As a matter of fact I never owned any stock, or acquired any stock in the company that took over hull one hundred and fifty-four ('Romulus'), if any company ever took her over."

(Record, p. 76.)

The defendant testified:

"The vessel was commandeered by the United States Shipping Board under their letter, dated August 24, 1917, and I continued to send cablegrams to Mr. Lindvig concerning this matter during Septemebr, and to correspond with the United States Shipping Board in regard to it. In my account to Mr. Lindvig of October 15, 1917, I included the following items:

"Office remuneration of handling contract Union Iron Works, a/c Hull 154, attending to payments, etc., $10,000.00."

(Record, p. 76.)

This $10,000 to defendant was included by plaintiff to the Federal Government as one of the items of the vessel's cost, when plaintiff submitted the items of cost paid out by him to the United States Shipping Board, which was appointed to represent Norwegian owners of commandeered vessels.

The copy of the bill submitted by plaintiff to the United States Shipping Board, and produced by plaintiff upon the trial at the demand of the defendant, reads:

"July 3, 1918.

United States Shipping Board
to
A. O. Lindvig,
Kristiania, Norway.

| | |
|---|---|
| For disbursements, account building Hull No. 154, known as S.S. "Romulus", commandeered by the United States Government | $232,500.00 |
| Union Iron Works, payments on building contract | 232,500.00 |
| Edward S. Hough, services rendered superintending building of ship | 1,250.00 |
| C. Henry Smith, cost of cables regarding building of ship and contract, to and from Kristiania, Norway | 2,000.00 |
| C. Henry Smith, Remuneration for Procuring and Handling Contract, Union Iron Works, Attending to Payments, Etc. | 10,000.00 |
| Nathan H. Frank, services rendered matter of proposed requisition of said vessel | 800.00 |
| A. O. Lindvig, expenses of inspector Hooslef | 1,876.50 |
| | $248,926.50" |

(Record, p. 93.)

John McClelland, with Henry Lund & Co., importing, exporting and shipping agents, testified that they had contracted for the building of vessels at San Francisco for the account of owners at Norway, and that for defendant's services in contracting for the building of the "Regulus" and "Romulus" he should have received one and one-half per cent of the contract prices as a minimum (Record, p. 135).

**(b) Assignments of error as to "Romulus" item.**

No. 2. In sustaining plaintiff's objection to the following question propounded by defendant to C. Henry Smith:

> "Q. What was the market value of the 'Romulus' at the time of her completion?"
>
> (Record, p. 229.)

No. 48. In refusing to give instruction No. 17, requested by the defendant, and reading:

> "I charge you that the agency contract entered into by and between A. O. Lindvig and C. Henry Smith on June 29, 1914, had sole reference to C. Henry Smith acting as the agent for the 'A/S Baja California' in the operation of steamers between Mexican, Central American, West Coast of United States, and British Columbia ports; and I instruct you that the services rendered by C. Henry Smith in contracting for, and supervising the construction of the 'Romulus' and 'Regulus', and in purchasing the 'Governor Forbes', were not included within his duties as agent under said contract of June 29, 1914."
>
> (Record, p. 247.)

No. 49. In refusing to give instruction No. 23, requested by the defendant, and reading:

> "I instruct you that it is not necessary for the defendant to prove an express promise by the plaintiff to compensate the defendant for his services in connection with the contracting and building of the 'Regulus' and 'Romulus'. It is sufficient for the defendant if he proves in this behalf that the services rendered by him in connection with the contracting and build-

ing of said vessels were outside of the scope of his duties under the agency contract of June 29, 1914, and that his services in connection with the contracting and building of said vessels were beneficial to the plaintiff, and were of such a nature, and rendered under such circumstances as to imply a promise upon the part of the plaintiff to pay for said services."

(Record, p. 247.)

In directing a verdict in favor of the plaintiff, assignments 29 and 51 (Record, pp. 239, 247).

---

**IV. COMMISSION PURCHASE "GOVERNOR FORBES"—$6000.**

**(a) References to record relating to assignments of error.**

Mr. Smith arranged to buy the "Governor Forbes" in September, 1916, for $340,000, with a 2 per cent commission. This 2 per cent was mentioned in his opening cablegram to Mr. Lindvig, which stated: " 'Governor Forbes' offered firm $350,000 plus 2 per cent commission" (Record, p. 94). When the "Governor Forbes" arrived at San Francisco, Mr. Smith was in Europe, and it was not discovered until the examination of his books by public accountants in late October, 1917, that the commission had not been previously charged (Record, p. 145).

But whether under an express contract or upon a *quantum meruit* Mr. Smith was entitled to this commission. As he testified:

"I purchased the steamer and I took the responsibility for inspection and classification that she was as represented and I delivered the steamer to him."

(Record, p. 94.)

**(b) Assignment of errors as to commission on purchase of "Governor Forbes".**

No. 5. In sustaining plaintiff's objection to the following question propounded by the defendant to the witness, C. Henry Smith:

"Q. What was the value of the 'Governor Forbes', the market value here in San Francisco, at the time of her delivery in 1917?"

(Record, p. 230.)

No. 47. In refusing to give instruction No. 15, requested by the defendant, and reading:

"The defendant is entitled to recover a commission on the purchase of the 'Governor Forbes', notwithstanding he may have entered into an agreement for the purchase of said vessel in November, 1916, and notwithstanding the payment of her purchase price, may have been completed in the spring of 1917, provided you believe from the evidence that the services rendered by the defendant in connection with the cablegrams exchanged between him and the plaintiff entitled him to such a commission, and provided you believe that the omission to enter said commission upon any of the accounts presented to the plaintiff prior to October 1, 1917, was due to inadvertence and mistake."

(Record, p. 246.)

No. 48. In refusing to give instruction No. 17, requested by the defendant, and reading:

"I charge you that the agency contract entered into by and between A. O. Lindvig and C. Henry Smith on June 29, 1914, had sole reference to C. Henry Smith, acting as the agent for the 'A/S Baja California' in the operation of steamers between Mexican, Central American, West Coast of United States, and British Columbia ports; and I instruct you that the services rendered by C. Henry Smith in contracting for, and supervising the construction of the 'Romulus' and 'Regulus', and in purchasing the 'Governor Forbes', were not included within his duties as agent under said contract of June 29, 1914."

(Record, p. 247.)

---

### V. "SINALOA" SALVAGE ACCOUNT—$3165.27.

**(a) Quotations from and references to the record relating to assignments of error.**

All of the evidence offered by the defendant was excluded. The defendant offered to show that the "Sinaloa" went aground in the fog near Cape Blanco, Mendocino County, on the morning of June 16, 1916; that Lindvig requested Smith to do everything possible to save her; that Smith went immediately to the vessel, contracted for her salving, co-operated with the underwriters, disbursed the funds, and that when she was floated, Smith had her brought to San Francisco and there submitted her to competitive bidding, and afterwards when the lowest bidder did not care to go on with the work, he took the matter up with the United States Shipping Board and arranged that the repairs be proceeded with in order to enable the "Sinaloa" to

continue the carrying of nitrate for the Dupont de Nemours Company (Record, pp. 105-109).

Wilferd Page, of George E. Billings Company, general average adjusters, produced a printed book which constituted an adjustment of the general average and salvage expenses in connection with the wreck of the "Sinaloa" (Record, p. 132). This book was completed in August or September, 1918 (Record, p. 132). Copies of this book were delivered to Mr. Lindvig, for the owners of the vessel (Record, p. 132). On page 226 of this book appears the following item:

> "$3,165.27. C. Henry Smith, remuneration for handling a/c 5% com. on $63,305.54.....$3,165.27"
>
> (Record, p. 131.)

After showing by Mr. Page that copies of this book were delivered to Mr. Lindvig, an objection was sustained and an exception noted in respect of the following question asked Mr. Page by the defendant:

> "Q. I will ask you to state whether Mr. Lindvig ever thereafter, or any member of his office, dissented from the item therein contained, the $3165.27 allowed to Mr. Smith in connection with his services with respect to the salvaging of this vessel?"
>
> (Record, p. 132.)

In respect to the cargo, objection was sustained and exception noted as to the following question to Mr. Page:

"Q. Was there any contribution to be made by them to the general average?"

After stating that he had nothing to do with the collections from the underwriters, objection was sustained and exception noted in respect of the following question:

"Q. So far as the cargo was concerned, do you know whether or not Mr. Lindvig has, in fact, collected from the cargo upon the basis of including in the general average this item of $3165.27 allowed to Mr. Smith?"

(Record, p. 133.)

John A. Bishop, with Johnson & Higgins, average adjusters, testified:

"Q. Have you had occasion at numerous times to observe what is the practice, if any, with respect to allowance to general agents of reimbursement to themselves for services rendered in connection with salvaging of vessels where their contracts provide that they shall have a fixed percentage of the freight earned or carried?

A. I have had numerous instances.

Q. Numerous instances? A. Yes.

Q. Will you name a few of the instances that you remember in which you have made observation in connection with that practice or custom?

A. Williams, Dimond & Co., agents of the American-Hawaiian Steamship Company, Lennon Gray, who was the agent for some British shipowners, Balfour, Guthrie & Co., agents for the Harrison Direct Line. We have had several instances for Williams, Dimond, as agents for the American-Hawaiian Line. I suppose I could name at least from six to eight without going back on my records at all.

Q. Would you do that, please?

A. In the case of the 'Alaskan', belonging to the American-Hawaiian Line, Williams, Dimond & Co. were general agents on the Coast; she was on fire in San Diego in 1910. The 'Pennsylvania' was also on fire down near Panama, bound for San Francisco; the 'Anubis', of the Cosmos Line, went ashore in, I think it was, 1908, near Santa Barbara, on San Miguel Island; Lennon Gray was the agent for the Cosmos Line at that time. The 'Pleiades' was ashore on the Southern California coast, belonging to the Luckenbach Steamship Company, Williams, Dimond & Co. were agents. The 'St. Nicholas', a British vessel, was on fire bound in to San Francisco, Balfour, Guthrie & Co. were agents; the 'Queen Alexandria' struck on the Columbia River Bar, putting into San Francisco, E. C. Evans, of San Francisco, were agents."

(Record, p. 128.)

The questions which follow were then asked Mr. Bishop, objections sustained to them and exceptions to the rulings noted by the defendant:

"Q. I will ask you to state whether or not, in all the cases mentioned by you occurring with respect to the vessels named, of which Williams, Dimond & Co. were the agents, and Mr. Gray was the agent, and Evans was the agent, whether or not in each and every of these cases the general agent was allowed compensation for the services rendered by him in connection with those vessels?

Q. I will ask you whether or not it is the custom in all cases where the general agents render services in connection with the salvage of the vessel, to not only allow him from his principal a compensation for the general services in connection therewith, but an allowance

of 2½ per cent in the total amount of disbursements in connection therewith, if the money be that of his principal, and 5 per cent if the money be that of himself?

Mr. Moore. I will ask you, Mr. Bishop, what is the fact as to whether or not there is a uniform custom in San Francisco, and has been for twenty years last past, of allowing general agents of steamers and steamship companies, special compensation for their services rendered in connection with salvaging of vessels, and a commission of 2½ per cent upon moneys advanced by them, if the money belongs to the owners and 5 per cent in cases where the general agency contract specifies 5 per cent as the compensation therein mentioned in respect to freight earned?''

(Record, pp. 129-130.)

In addition to the assignments of error in respect to the sustaining of objections to the above questions to Mr. Bishop (Assignments 6-12, Record, pp. 230-232), the following offer of proof and errors were assigned in connection with this ''Sinaloa'' Salvage item:

''Q. Now, your charge in respect to the 'Sinaloa' salvage item is $3165.27, and I want to take that item up next.

Mr. Frank. We will have to object initially to anything at all with reference to salving the 'Sinaloa' because the 'Sinaloa' was one of the vessels in the employ of the steamship line, and he being in that employ at that time. it was a part of his duty as general agent to take care of the vessels.

The Court. I will tell you what I think would be the better way. I think you had best make to the Court a brief statement of the character of the evidence you propose to offer

in support of this item, and the Court will then pass upon that as a statement—I mean pass upon the question then as to whether or no under that statement it is within or outside the lines of his contract.

Mr. Moore. I propose to show that on June 14, 1917, the 'Sinaloa' ran aground in a fog a mile south of Cape Blanco, and that on June 15th Mr. Smith received a wire from the captain of the vessel to that effect; that on the same day he, Mr. Smith, started a tug from Coos Bay, which was expected to arrive at the place where the vessel was in four or five hours; that he was further wired by the captain that he must have assistance, the vessel was leaking badly, there was water in the afterhold, and that Mr. Smith left that same night for Cape Blanco with Captain Curtis of the Marine Underwriters, going overland to Eureka, and from there by boat north to the vessel at Cape Blanco; that before arriving he wired the captain he was sending men and cables and equipment; and that on July 11th, a barge was installed alongside the vessel and all of the gear was received; that he facilitated the saving of the ship; that he had a great deal of correspondence with the plaintiff in regard to her, and what should be done with respect to her, and in the adjustment upon her, and a great deal of correspondence with the people doing the salvaging operation; that the defendant insisted she be towed to San Francisco; and when there he submitted her to bids of the different shipbuilding companies; that there were three bids given for her repairs, the lowest being by the United Iron Works for $135,000.00, and the next lowest being $200,000.00; and that the United Iron Works did not want to do the job because they were immediately afterward commandeered by the Government;

and that Mr. Smith then took up the matter with the Shipping Board, and obtained a permit from the Shipping Board providing for the repairing of the vessel by the United Iron Works.

Mr. FRANK. I have nothing to say excepting that it is incompetent and immaterial, the statement he has made."

The defendant then offered to introduce certain cablegrams, stating:

"It is for purpose of showing services rendered by Mr. Smith in connection with the salvage of the 'Sinaloa' amounting to some $2000, which represents 5% of the sum total of $60,000 that was paid out. I want to state the purpose. That was advanced by Mr. Smith, and showing the communications between himself and Mr. Lindvig during the course of that time and the requests that were made upon him by Mr. Lindvig, in the matter and the appointment by Mr. Smith and the revocation of the appointment by Mr. Lindvig as to the appointments made by Smith."

(Record, pp. 104-106.)

**(b) Assignments of error as to "Sinaloa" salvage item.**

*Assignment of Error No. 13:*

In sustaining plaintiff's objection to the offer by defendant in evidence of the following items from the "Statement of General Average, case of the 'Sinaloa', June 15, 1917":

| | |
|---|---|
| "$3,165.27 C. Henry Smith — Remuneration for handling a/c 5% Com. on $63,305.54 | $ 3,165.27 |
| "Provisions $38.07, General Average, 2826.95, Advances | 274.90 |

"Vessel & Owners, $35.35.
$4,290.82. Disbursing the General Average:
With funds in hand 2½% on $8,552.19 ..... 213.80
Without funds in hand 5%, $81,540.32 ..... 4,077.02
As customary ..... 4,290.82"

"$11,380.74 Interest on General Average Disbursements and allowances from date of outlay until probable date of settlement, $108,-388.77 at 7% per annum ..... $11,380.74"

(Record, pp. 232-233.)

*Assignment of Error No. 14:*

In sustaining plaintiff's objection to the offer in evidence by the defendant of the following cablegrams exchanged between the plaintiff and the defendant:

"June 16, 1916.

"'Sinaloa' aground near Cape Blanco in fog this morning have sent tug for assistance.

Smith."

"June 17, 1916.

"Alta sailed for Melbourne stop Sinaloa position very difficult stop broadwide to the beach stop leaking stop ten feet water aft hold.

Smith."

"June 19, 1916.

"Wilcox Peck Hughes attending average Sinaloa.

Lindvig."

"June 20, 1916.

"Urgent Wilcox cable chance floating Sinaloa slight stop everything possible must be done to save her.

Lindvig."

"June 20, 1916.

"Kindly cable amount Sinaloa insured stop Smith now at ship stop after hold flooded no water forward stop discharging cargo onto barges.

Smith."

"June 22, 1916.

"Steamer Sinaloa insured as follows Seven hundred thousand kroners full three hundred thousand hull interest hundred thousand freight interest stop understand now prospects save ship stop condemnation must be avoided if by any means possible.

Lindvig."

"June 21, 1916.

"Sinaloa appointed Johnson and Higgins adjusters stop they are agents for Skuld.

Smith."

"June 23rd, 1916.

"Steamer Sinaloa you must adhere to my instructions appoint Wilcox Peck & Hughes who are agents main hull underwriters stop should otherwise have no objection employ Johnson Higgins.

Lindvig."

"June 23, 1916.

"Believe Sinaloa may be floated according to experts stop assembling fuel equipment to go north stop vessel in a rather protected position during summer.

Smith."

"June 29, 1916.

"Please insure ocean going barge sent to Sinaloa value fifteen thousand dollars.

Smith."

"July 2, 1916.

"Covered hull insurance barge fifteen thousand dollars two per cent voyage Frisco to steamer Sinaloa therefrom to Puget Sound or Frisco.

Lindvig."

"June 30, 1916.

"Please place insurance salvage equipment sent abroad Phoenix and ocean going barge to Sinaloa valued at twenty-five thousand dollars.

Smith."

"July 3, 1916.

"Steamer Sinaloa referring your cables 29/6 and 30/6 we have insured two barges and equipment in all 40,000 dollars value is this correct.

Lindvig."

(Record, pp. 233-235.)

*Assignment of Error No. 15:*

In sustaining plaintiff's objection to the following question propounded by the defendant to the witness C. Henry Smith:

"Q. I will ask you to state whether you arranged where the vessel should be brought to when she was taken away or when she was floated."

(Record, pp. 235-236.)

*Assignment of Error No. 16:*

In sustaining plaintiff's objection to the following question propounded by the defendant to the witness C. Henry Smith:

"Q. I will ask you to state whether or not you submitted the repairs of the vessel to different shipbuilding yards here in San Francisco on the lowest bid?"

(Record, p. 236.)

*Assignment of Error No. 17:*

In sustaining plaintiff's objection to the following question propounded by the defendant to the witness Wilfred Page:

"Q. What became of the different copies of bound volume entitled 'Statement of the General Average Case of the "Sinaloa", June 15, 1917', as they were made up, what disposition was made of them?"

(Record, p. 236.)

*Assignment of Error No. 18:*

In sustaining plaintiff's objection to the following question propounded by the defendant to the witness Wilfred Page:

"Q. I will ask you to state whether Mr. Lindvig ever thereafter or any member of his office, dissented from the item therein contained, the $3,165 allowed to Mr. Smith in connection with his services with respect to the salvaging of this vessel?"

(Record, p. 236.)

*Assignment of Error No. 19:*

In sustaining plaintiff's objection to the following question propounded by the defendant to the witness Wilfred Page:

"Q. Was there any contribution to be made by them (Dupont Company) to the general average?"

(Record, pp. 236-237.)

*Assignment of Error No. 20:*

In sustaining plaintiff's objection to the following question propounded by the defendant to the witness Wilfred Page:

"Q. So far as the cargo was concerned, do you know whether or not Mr. Lindvig has, in fact, collected from the cargo upon the basis of including in the general average this item of $3,165, allowed to Smith?"

(Record, p. 237.)

---

### VI. COMMISSION DUPONT CONTRACT—$25,517.80.

**(a) References to record relating to assignments of error.**

For the return voyages of these vessels Mr. Smith entered into a yearly contract for the carriage of nitrate with the Dupont de Nemours Company. The last of these contracts entered into by Mr. Smith was dated July 10, 1917. This contract covered the carrying of 40,000 tons during the year June 1, 1917—June 1, 1918. Mr. Lindvig instructed Mr. Smith to first obtain the consent of the British Admiralty before entering into this contract and meantime not to fix for more than one voyage at a time, but Mr. Smith considered such a course impracticable and unnecessary, and therefore entered into the contract in his own name, and

so worded the contract as to permit the nitrate to be carried by steamers other than the "Baja California", "Sinaloa" and "Regulus". Afterward when Mr. Lindvig continued to object to the contract because the consent of the British Admiralty had not been obtained, Mr. Smith advised both Mr. Lindvig and the Dupont Company that he would carry out the contract himself if Mr. Lindvig did not care to do so. Mr. Smith also notified Mr. Lindvig that if he took over the nitrate contract it would be subject to Mr. Smith's 5 per cent commission (Record, pp. 110-111).

In his letter to plaintiff of October 6, 1917, defendant states:

> "I am personally responsible for this agreement made with the Dupont Company, and I shall carry it out myself, if you do not." (Record, p. 113.)

In writing to Mr. W. A. Simonton, traffic manager of the Dupont Company, on October 5, 1917, defendant stated:

> "If any trouble should be made, however, I can get the necessary tonnage in 60 or 90 days or even earlier." (Record, p. 113.)

The contract was actually taken over and carried out by Mr. Lindvig.

**(b) Assignments of error as to commission on Dupont contract.**

*Assignment of Error No. 33:*

In refusing to give instruction No. 9, requested by the defendant, and reading:

"If you find that defendant has performed on his part all the acts necessary to the accomplishment of a particular result, such as the freighting of 40,000 tons, 10% more or less, of cargo in plaintiff's vessels, for and on behalf of the du Pont de Nemours Powder Company, defendant cannot be deprived of his right to the entire compensation by the refusal or neglect of the plaintiff to thereafter perform the necessary acts on his part, whereby the contemplated result is defeated or only partly executed."

(Record, p. 240.)

*Assignment of Error No. 34:*

In refusing to give instruction No. 10, requested by the defendant, and reading:

"The failure, refusal or inability of plaintiff to carry out the complete contract for the transportation of 40,000 tons, 10% more or less, of cargo for the du Pont de Nemours Powder Company does not defeat defendant's right to full compensation for negotiating this contract, nor is this right defeated by the fact, if it be a fact, that plaintiff and the du Pont de Nemours Powder Company subsequently modified, rescinded or cancelled the contract or a part thereof by mutual consent."

(Record, p. 240.)

*Assignment of Error No. 35:*

In refusing to give instruction No. 11, requested by the defendant, and reading:

"If you find that plaintiff carried out or offered to perform the agreement with du Pont

de Nemours Powder Company, or a part of said agreement, with knowledge of the whole agreement, I instruct you that such conduct on the part of plaintiff constitutes a ratification of the whole agreement, and that defendant is entitled to compensation for procuring the said agreement."

(Record, p. 241.)

*Assignment of Error No. 36:*

In refusing to give instruction No. 27, requested by the defendant, and reading:

"I instruct you that, under the contract of June 29, 1914, the defendant is entitled to a reasonable commission on the freight earned by the steamers of the Baja California Company in performing the contract with the du Pont de Nemours Powder Company for the transportation from the Republic of Chile, to San Francisco, California, and elsewhere, of 40,000 tons, 10% more or less, of nitrate."

(Record, p. 241.)

*Assignment of Error No. 43:*

In refusing to give instruction No. 13, requested by the defendant, and reading:

"If you find that defendant was to receive a commission for contracts made for the benefit of plaintiff and that, during the term of his agency, he procured contracts for the benefit of plaintiff, I instruct you that defendant is entitled to commissions not merely on the contracts which were performed before the termination of the defendant's agency, but that defendant is also entitled to commissions on all contracts secured by him, and performed, or to

be performed, by plaintiff subsequent to the termination of defendant's agency."

(Record, p. 244.)

---

VII. BALANCE ESTIMATED FREIGHT EARNINGS—$5000.

**(a) Reference to record in connection with assignments of error.**

This item relates to cargo booked prior to October 1, 1917, but not actually loaded on board until after October 1st.

(Record, p. 119.)

The agency terminated upon October 1st, but it is the defendant's contention that the commission on the freight above mentioned was "earned" as of October 1st.

**(b) Assignments of error as to commission on freight booked prior to October 1st.**

*Assignment of Error No. 43:*

In refusing to give instruction No. 13, requested by the defendant, and reading:

> "If you find that defendant was to receive a commission for contracts made for the benefit of plaintiff and that, during the term of his agency, he procured contracts for the benefit of plaintiff, I instruct you that defendant is entitled to commissions not merely on the contracts which were performed before the termination of the defendant's agency, but that defendant is also entitled to commissions on all contracts secured by him, and performed,

or to be performed, by plaintiff subsequent to the termination of defendant's agency."

(Record, p. 244.)

*Assignment of Error No. 44:*

In refusing to give instruction No. 20, requested by the defendant, and reading:

"As to the item of $2049.65 as defendant's commission on the inward freight of the 'Governor Forbes', I charge you as a matter of law that your verdict should be in favor of the defendant."

(Record, p. 245.)

---

**VIII. COMMISSION ON INWARD FREIGHT "GOVERNOR FORBES"—$2049.65.**

**(a) Reference to record in connection with assignments of error.**

This item relates to the inward freight of the "Governor Forbes" on her voyage arriving here on October 3 or 4, 1917 (Record, p. 123). She left Guayaquil in September, 1917, with a cargo of cocoa, and the $2,049.65 is 5 per cent of the freight money paid for carrying the cocoa.

**(b) Assignments of error as to commission on inward freight "Governor Forbes".**

*Assignment of Error No. 43:*

In refusing to give instruction No. 13, requested by the defendant, and reading:

"If you find that defendant was to receive a commission for contracts made for the benefit of plaintiff, and that, during the term of his agency, he procured contracts for the benefit of plaintiff, I instruct you that defendant is entitled to commissions not merely on the contracts which were performed before the termination of the defendant's agency, but the defendant is also entitled to commissions on all contracts secured by him, and performed, or to be performed, by plaintiff subsequent to the termination of defendant's agency."

(Record, p. 244.)

*Assignment of Error No. 44:*

In refusing to give instruction No. 20, requested by the defendant, and reading:

"As to the item of $2049.65 as defendant's commission on the inward freight of the 'Governor Forbes', I charge you as a matter of law that your verdict should be in favor of the defendant."

(Record, p. 245.)

No. 3682

# United States

# Circuit Court of Appeals

## For the Ninth Circuit.

# Transcript of Record.

**(IN THREE VOLUMES.)**

THE UNITED STATES OF AMERICA,

Appellant,

vs.

CALIFORNIA MIDWAY OIL COMPANY, ASSOCIATED OIL COMPANY, COLUMBUS MIDWAY OIL COMPANY, 32 OIL COMPANY, L. B. McMURTRY, J. M. McLEOD, and STANDARD OIL COMPANY,

Appellees.

**VOLUME I.**

**(Pages 1 to 384, Inclusive.)**

**Upon Appeal from the United States District Court for the Southern District of California, Northern Division.**

FILED
JUN - 4 1921
F. D. MONCKTON, CLERK

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3682

# United States

# Circuit Court of Appeals

## For the Ninth Circuit.

# Transcript of Record.

**(IN THREE VOLUMES.)**

THE UNITED STATES OF AMERICA,

Appellant,

vs.

CALIFORNIA MIDWAY OIL COMPANY, ASSOCIATED OIL COMPANY, COLUMBUS MIDWAY OIL COMPANY, 32 OIL COMPANY, L. B. McMURTRY, J. M. McLEOD, and STANDARD OIL COMPANY,

Appellees.

**VOLUME I.**

**(Pages 1 to 384, Inclusive.)**

**Upon Appeal from the United States District Court for the Southern District of California, Northern Division.**

Filmer Bros. Co. Print. 330 Jackson St., S. F., Cal.

# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]


| | Page |
|---|---|
| Amended Bill of Complaint | 4 |
| Answer of California Midway Oil Company | 20 |
| Answer of Defendant L. B. McMurtry | 69 |
| Answer of Defendants Thirty-two Oil Company and J. M. McLeod | 42 |
| Assignment of Errors | 112 |
| Certificate of Clerk U. S. District Court to Transcript of Record | 931 |
| Certificate of Judge to Statement of Evidence | 929 |
| Citation on Appeal | 1 |
| Decree of Dismissal | 109 |
| DEPOSITIONS ON BEHALF OF PLAINTIFF: | |
| BACON, JOHN L. | 155 |
| Cross-examination | 155 |
| BANKS, SAMUEL R. | 382 |
| Cross-examination | 391 |
| BASHORE, HARRY E. | 676 |
| Cross-examination | 700 |
| Redirect Examination | 702 |
| BERRY, GEORGE W. | 338 |
| Cross-examination | 348 |
| Redirect Examination | 360 |

Index.

Page

DEPOSITIONS ON BEHALF OF PLAINTIFF—Continued:
Recross-examination ..... 360
BLACKMAN, FRANK B. ..... 156
CHAPMAN, FRANK B. ..... 164
Cross-examination ..... 179
Redirect Examination ..... 216
CHRISTMAN, WELLINGTON F. ..... 703
Cross-examination ..... 710
Redirect Examination ..... 715
CRANSTON, VICTOR G. ..... 162
Cross-examination ..... 163
CUNNINGHAM, JESSE I. ..... 127
Cross-examination ..... 131
DENISON, FRANKLIN H. ..... 147
Cross-examination ..... 149
Redirect Examination ..... 150
DUNBAR, CHARLES A. ..... 122
Cross-examination ..... 125
FARRELL, JOSEPH EDWARD ..... 545
Cross-examination ..... 556
FREEMAN, SMITH H. ..... 493
Cross-examination ..... 503
Redirect Examination ..... 506
GARDINER, CHARLES W. ..... 217
Cross-examination ..... 236
Redirect Examination ..... 247
HAGENBUCK, HARRY ..... 159
Cross-examination ..... 159
HARDER, JULIUS F. ..... 402
Cross-examination ..... 425

Index. Page

DEPOSITIONS ON BEHALF OF PLAINTIFF—Continued:
Redirect Examination ..... 445
Recross-examination ..... 450
HATCH, EMALINE ..... 716
HUSBANDS, WILLIAM JOSEPH ..... 162
Cross-examination ..... 162
KEENAN, WILLIAM A. ..... 609
Cross-examination ..... 621
Redirect Examination ..... 622
LEE, THOMAS H. ..... 161
METZ, EUGENE ..... 586
Cross-examination ..... 593
Redirect Examination ..... 595
MAHR, WILLIAM A. ..... 525
Cross-examination ..... 537
Redirect Examination ..... 543
MORNINGSTAR, GUY A. ..... 152
Cross-examination ..... 152
NEWHOF, SIMON ..... 143
Cross-examination ..... 145
NORTON, JAMES ..... 159
Cross-examination ..... 160
NORTON, JOSEPH ..... 160
O'NEILL, BERNARD M. ..... 153
Cross-examination ..... 154
PENTZ, JULIUS W. ..... 361
Cross-examination ..... 369
POWELL, EDWIN L. ..... 309
Cross-examination ..... 329
Redirect Examination ..... 335

Index. Page

DEPOSITIONS ON BEHALF OF PLAINTIFF—Continued:
PRATT, FRANCIS E. ..... 452
Cross-examination ..... 461
Redirect Examination ..... 472
Recross-examination ..... 472
Redirect Examination ..... 474
RENTSCHLER, HARRY B. ..... 145
Cross-examination ..... 146
RICHMOND, JULIAN P. W. ..... 278
Cross-examination ..... 294
Redirect Examination ..... 304
ROLL, HOKAN ..... 157
Cross-examination ..... 157
ROMAINE, JR., FRANK H. ..... 572
Cross-examination ..... 583
Redirect Examination ..... 586
SHADBURNE, L. A. ..... 119
Cross-examination ..... 122
TAYLOR, FRANK D. ..... 507
Cross-examination ..... 520
Redirect Examination ..... 523
Recross-examination ..... 525
THICKENS, JOHN B. ..... 737
Cross-examination ..... 740
Redirect Examination ..... 744
Recross-examination ..... 745
Redirect Examination ..... 745
THORN, CHARLES W. ..... 665
Cross-examination ..... 676
THORN, FREDERICK S. ..... 393

Index. Page

DEPOSITIONS ON BEHALF OF PLAINTIFF—Continued:
Cross-examination ..... 399
THORN, HARRY B. ..... 474
WALKER, C. RUPERT ..... 595
Cross-examination ..... 603
WALKER, HERBERT M. ..... 623
Cross-examination ..... 659
Redirect Examination ..... 662
WELCH, RICHARD B. ..... 250
Cross-examination ..... 259
Redirect Examination ..... 277
WILSON, WALTER B. ..... 560
Cross-examination ..... 567
Redirect Examination ..... 571

DEPOSITIONS ON BEHALF OF DEFENDANTS:
HANDEL, GEORGE F. ..... 746
GILLETTE, GEORGE GRANT ..... 862
Cross-examination ..... 863
Redirect Examination ..... 864

EXHIBITS:
Government's Exhibit No. 1—Ratification of Power of Attorney Signed by Frank B. Chapman ..... 167
Government's Exhibit No. 1—Proxy Dated August 26, 1910, Signed by Frank B. Chapman ..... 175
Government's Exhibit No. 6—Consent to Distribution of Dividends of Pacific

Index. Page

EXHIBITS—Continued:

Oil Lands Company—Dated December 13, 1913 ..... 176

Plaintiff's Exhibit No. 4—Power of Attorney from Herbert M. Walker et al. to L. B. McMurtry, Dated December 19, 1907 ..... 877

Plaintiff's Exhibit No. 10—Location Notice—Placer Claim, Signed by Herbert M. Walker et al..... 881

Plaintiff's Exhibit No. 32—Letter Dated December 3, 1913, Pacific Oil Lands Company to Harry B. Thorn..... 481

Plaintiff's Exhibit No. 33—Contract Dated May 17, 1909, Between L. B. McMurtry and J. M. McLeod..... 895

Plaintiff's Exhibit No. 34—Letter Dated January 8, 1914, Pacific Oil Lands Company to Harry B. Thorn ..... 483

Plaintiff's Exhibit No. 35—First Report to Stockholders of Pacific Oil Lands Company ..... 484

Plaintiff's Exhibit No. 36—Envelope Addressed to Harry B. Thorn..... 490

Plaintiff's Exhibit No. 36—Contract Dated October 8, 1908, Between L. B. McMurtry and Mrs. J. M. McLeod..... 899

Plaintiff's Exhibit No. 37—Assignment Dated November 20, 1908, Mrs. J. M. McLeod to W. D. Wilson et al..... 901

Index. Page

EXHIBITS—Continued:

Plaintiff's Exhibit No. 40—Letter Dated August 4, 1913, Notice of Meeting of Stockholders of Pacific Oil Lands Company ..... 499

Plaintiff's Exhibit No. 40—Assignment of Interests in Section 32, Dated December 29, 1908 ..... 902

Plaintiff's Exhibit No. 41—Letter Dated January 8, 1914, Pacific Oil Lands Company to S. H. Freeman ..... 501

Plaintiff's Exhibit No. 58—Letter Dated April 24, 1914, F. H. Romaine, Jr. to J. McG. Williamson ..... 581

Plaintiff's Exhibit No. 62—Letter Dated August 17, 1910, J. B. Thickens to C. Rupert Walker ..... 596

Plaintiff's Exhibit No. 65—Letter Dated November 12, 1908, C. L. Claflin to Wilson & Wheat ..... 911

Plaintiff's Exhibit No. 66—Letter Dated November 14, 1908, Wilson, Wheat et al. to C. L. Claflin ..... 912

Plaintiff's Exhibit No. 67—Letter Dated December 3, 1919, Pacific Oil Lands Company to C. Rupert Walker ..... 599

Plaintiff's Exhibit No. 68—Letter Dated January 8, 1914, Pacific Oil Lands Company to C. Rupert Walker ..... 601

Defendants' Exhibit "B"—Statement of Lands Held by McMurtry & Hoeppner

Index. Page

EXHIBITS—Continued:
in the Midway Field, Signed W. A. Williams ..... 913
Defendants' Exhibit "K"—Ratification of Location of Lands by Board of Associated Oil Company ..... 913
Defendants' Exhibit "L"—Letter Dated June 22, 1911, L. B. McMurtry to Associated Oil Company ..... 924
Defendants' Exhibit "O–1"—Letter Dated December 19, 1910, L. B. McMurtry to O. Scribner ..... 927
Defendants' Exhibit No. 5—Check Dated January 8, 1914, Pacific Oil Lands Company to Wm. F. Christman ..... 714
Defendants' Exhibit No. 4—Receipt Dated September 16, 1911, Wm. F. Christman to L. B. McMurtry..... 711
Defendants' Exhibit No. 6—Affidavit of Jesse I. Cunningham ..... 132
Names and Addresses of Attorneys of Record.. 3
Order Allowing Appeal..... 115
Order Enlarging Time to and Including March 1, 1920, to File Record and Docket Cause... 933
Order Enlarging Time of Return Day of Citation and Filing of Record and Docketing of Cause to and Including June 1, 1920..... 935
Order Enlarging Time of Return Day of Citation and Filing of Record and Docketing of Cause to and Including August 1, 1920..... 938

Index.

Page

Order Enlarging Time of Return Day of Citation and Filing of Record and Docketing of Cause to and Including November 1, 1920.. 941

Order Enlarging Time of Return Day of Citation and Filing of Record and Docketing of Cause to and Including February 1, 1921... 945

Order Enlarging Time of Return Day of Citation and Filing of Record and Docketing of Cause to and Including May 1, 1921.... 949

Order Enlarging Time of Return Day of Citation and Filing of Record and Docketing of Cause to and Including June 1, 1921..... 950

Petition for Appeal ..... 110

Praecipe for Transcript on Appeal..... 929

Statement of Evidence to be Included in Transcript on Appeal in the Above-entitled Cause ..... 119

Stipulation Enlarging Time of Return Day of Citation and Filing of Record and Docketing of Cause to and Including August 1, 1920 ..... 936

Stipulation Enlarging Time of Return Day of Citation and Filing of Record and Docketing of Cause to and Including November 1, 1920 ..... 940

Stipulation Enlarging Time of Return Day of Citation and Filing of Record and Docketing of Cause to and Including February 1, 1921 ..... 943

Stipulation Enlarging Time of Return Day of

Index. Page

Citation and Filing of Record and Docketing of Cause to and Including May 1, 1921.. 947
Stipulation Re Statement of Evidence on Appeal ..... 116

TESTIMONY ON BEHALF OF PLAINTIFF:
DENISON, BERT S. ..... 150
Cross-examination ..... 151
Redirect Examination ..... 151
Recross-examination ..... 152
GREENLEAF, SUE ..... 747
Cross-examination ..... 749
LONGLEY, PETER R. ..... 767
Cross-examination ..... 768
McMURTRY, L. B. ..... 769
Cross-examination ..... 791
Redirect Examination ..... 821
Recross-examination ..... 829
Redirect Examination ..... 834
Recross-examination ..... 835
Redirect Examination ..... 835
NETTLIS, CHARLES W. ..... 140
Cross-examination ..... 142
SHAW, EARL S. ..... 763
Cross-examination ..... 765

TESTIMONY ON BEHALF OF DEFENDANTS:
BRANN, WALTER S. ..... 861
CLAFLIN, C. L. ..... 839
Cross-examination ..... 842

Index. Page

TESTIMONY ON BEHALF OF DEFENDANTS—Continued:
GORDON, FREDERIC V. ..... 864
Cross-examination ..... 864
Redirect Examination ..... 865
LOVE, WILLIAM R. ..... 135
Cross-examination ..... 138
Redirect Examination ..... 140
McLEOD, J. M. ..... 866
Cross-examination ..... 868
MEINECKE, GEORGE A. ..... 716
Cross-examination ..... 717
Redirect Examination ..... 727
Recross-examination ..... 737
PRICE, W. C. ..... 865
RICKETTS, A. H. ..... 870
Cross-examination ..... 871
SCRIBNER, OTHELLO ..... 857
Cross-examination ..... 860
SNOOK, WALTER ..... 874
Cross-examination ..... 875
STRASSBURGER, ISAAC ..... 871
WATSON, DOUGLAS S. ..... 842
Cross-examination ..... 856
WERN, OTIS E. ..... 876
WIBLE, S. P. ..... 872
Cross-examination ..... 873
Redirect Examination ..... 874

In the District Court of the United States for the Southern District of California, Northern Division, Ninth Circuit.

IN EQUITY—No. B-10.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CALIFORNIA MIDWAY OIL COMPANY, ASSOCIATED OIL COMPANY, COLUMBUS MIDWAY OIL COMPANY, 32 OIL COMPANY, L. B. McMURTRY, J. M. McLEOD and STANDARD OIL COMPANY,

Defendants.

**Citation on Appeal.**

The United States of America—ss.

To California Midway Oil Company, Associated Oil Company, Columbus Midway Oil Company, 32 Oil Company, L. B. McMurtry, J. M. McLeod, and Standard Oil Company, GREETING:

YOU ARE HEREBY CITED and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty (30) days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Northern Division of the Southern District of California, wherein the United States of America is appellant and California Midway Oil Company, Associated Oil Company, Columbus Midway Oil

Company, 32 Oil Company, L. B. McMurtry, J. M. McLeod, and Standard Oil Company are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf. [I*]

WITNESS the Honorable R. S. BEAN, United States District Judge for the Southern District of California, this 15th day of December, in the year of our Lord one thousand nine hundred and nineteen and of the Independence of the United States of America one hundred and forty-third.

R. S. BEAN,
District Judge. [II]

Service of the above citation is hereby accepted this 22d day of December, A. D. 1919, for and on behalf of the appellees, California Midway Oil Company, Associated Oil Company, Columbus Midway Oil Company, 32 Oil Company, L. B. McMurtry, J. M. McLeod, and Standard Oil Company.

HENRY ACH,
EDMUND TAUSZKY,
Solicitors for Associated Oil Company.
ROBERT M. PEASE,
Solicitor for J. M. McLeod and 32 Oil Company.
JORDAN & BRANN,
Solicitor for L. B. McMurtry.
GEORGE E. WHITAKER,
Solicitor for California Midway Oil Company.

*Page-number appearing at foot of page of original certified Transcript of Record.

PILLSBURY, MADISON & SUTRO,
Solicitors for Standard Oil Company.
U. T. CLOTFELTER,
W. B.
Solicitor for Columbus Midway Oil Company. [III]

[Endorsed]: No. B–10. In the District Court of the United States for the Southern District of California, Northern Division. United States of America, Plaintiff, vs. California Midway Oil Co., et al., Defendants. Citation on Appeal. Filed Jan 8, 1920. Chas. N. Williams, Clerk. By R. S. Zimmerman, Deputy Clerk. [IV]

---

**Names and Addresses of Attorneys of Record.**

For Appellant:

HENRY F. MAY, Esq.,
E. B. LACY, Esq.,
Special Assistants to the Attorney General,
214 Post Office Building, San Francisco, Cal.

For Appellees:

HENRY ACH, Esq., San Francisco, Cal., Flatiron Bldg.,
EDMUND TAUSZKY, Esq., Sharon Bldg., San Francisco, Cal.,
For Associated Oil Company.
ROBERT M. PEASE, Esq., 519 Story Bldg., Los Angeles, Cal.,
For J. M. McLeod and 32 Oil Company.

JORDAN & BRANN, Monadnock Bldg., San Francisco, Cal.,
For L. B. McMurtry.

GEO. E. WHITAKER, Esq., Bakersfield, Cal.,
For California Midway Oil Company.

PILLSBURY, MADISON & SUTRO, Standard Oil Bldg., San Francisco, Cal.,
For Standard Oil Company.

U. T. CLOTFELTER, Esq., 436 Kirckhoff Bldg.,Los Angeles, Cal.,
For Columbus Midway Oil Company.

---

In the District Court of the United States for the Southern District of California, Northern Division, Ninth Circuit.

IN EQUITY—No. B–10.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CALIFORNIA MIDWAY OIL COMPANY, ASSOCIATED OIL COMPANY, COLUMBUS MIDWAY OIL COMPANY, 32 OIL COMPANY, L. B. McMURTRY, J. M. McLEOD, and STANDARD OIL COMPANY,
Defendants.

**Amended Bill of Complaint.**

To the Judges of the District Court of the United States for the Southern District of California, Sitting Within and for the Northern Division of said District:

Comes now The United States of America, by

Thomas W. Gregory its Attorney General, leave of Court being first had and obtained, and presents this, its amended bill in equity, against California Midway Oil Company, Associated Oil Company, Columbus Midway Oil Company, 32 Oil Company, L. B. McMurtry, J. M. McLeod, and Standard Oil Company (citizens and residents, respectively, as stated [1] in the next succeeding paragraph of this bill), and for cause of complaint alleges:

I.

Each of the defendants, California Midway Oil Company, Associated Oil Company, Columbus Midway Oil Company, 32 Oil Company, and Standard Oil Company, now is, and at all the times hereinafter mentioned as to it was, a corporation organized and existing under the laws of the State of California.

The defendant, J. M. McLeod, now is, and at all the times hereinafter mentioned as to him was, a resident and citizen of the Southern District and State of California.

The defendant, L. B. McMurtry, now is, and at all the times hereinafter mentioned as to him was, a resident and citizen of the Northern District and State of California.

II.

For a long time prior to and on the 27th day of September, 1909, and at all times since said date, the plaintiff has been and now is the owner and entitled to the possession of the following described petroleum, or mineral oil, and gas land, to wit:

The Northwest quarter (NW.¼) of Section thirty-two (32), Township thirty-one (31)

South, of Range twenty-three (23) East, Mount Diablo Base and Meridian, and of the oil, petroleum, gas and all other minerals contained in said land.

III.

On the 27th day of September, 1909, the President of the United States, acting by and through the Secretary of the Interior, and under the authority legally invested in him so to do, duly and regularly withdrew and reserved all of the land hereinbefore particularly described (together with other lands) from mineral exploration, and from all forms of location, settlement, selection, filing, entry, patent, occupation or disposal, under [2] the mineral and nonmineral land laws of the United States, and since said last-named date none of said lands have been subject to exploration for mineral oil, petroleum or gas, occupation, or the initiation of any right under the public land laws of the United States.

IV.

Notwithstanding the premises, and in violation of the proprietary and other rights of the plaintiff, and in violation of the laws of the United States, and in disregard of, contrary to, and by infringement upon the governmental policy adopted by the United States for the protection, conservation, disposal and use of the petroleum oil and gas contained in said land, and in other lands belonging to the United States, the said defendants, California Midway Oil Company, Associated Oil Company, Columbus Midway Oil Company, 32 Oil Company, L. B. McMurtry, J. M. McLeod and Standard Oil Company, entered

upon and took possession of the land hereinbefore particularly described, for the purpose of prospecting, exploring, drilling oil wells for, discovering, extracting, producing, converting and appropriating to their own use petroleum oil and gas therefrom, and did so prospect, and did continue so to prospect, extract, produce, explore, drill wells for, and discover, extract, produce, convert, and appropriate to their own use such oil and gas, long subsequent to the date on which said land was withdrawn, as hereinbefore mentioned, by said order of withdrawal of the 27th of September, 1909.

V.

None of said defendants, nor any other person or corporation under whom or through whom they claim a right or interest in said land, nor any other person, had discovered petroleum oil, gas or other minerals on or in said land before said land was withdrawn, as hereinbefore stated, by said order of [3] withdrawal of the 27th of September, 1909, as hereinbefore set forth.

VI.

None of the defendants, nor any other person, was, at the time said land was withdrawn on the 27th of September, 1909, as hereinbefore set forth, a *bona fide* occupant or claimant of said land and in the diligent prosecution of work leading to the discovery of oil or gas thereon or therein, under a valid and subsisting location under the mining laws of the United States.

VII.

Long after said land had been withdrawn from

prospecting, exploration, and entry, as hereinbefore mentioned, the defendants, California Midway Oil Company, Associated Oil Company, Columbus Midway Oil Company, 32 Oil Company, L. B. McMurtry, and J. M. McLeod, drilled oil and gas wells on said land for the extraction, production and appropriation of petroleum oil and gas therefrom, and in violation of the proprietary rights of the plaintiff therein, and in violation of the laws of the United States, and of the proclamations and orders issued by the President of the United States, and particularly in violation of said order of withdrawal of September 27th, 1909, and in disregard of, contrary to, and by infringement upon the general governmental policy adopted and declared by the United States for the protection, conservation, use and disposal of petroleum oil and gas in the land hereinbefore particularly described, and in other lands belonging to the United States, to the great and irremediable damage of the plaintiff, and to the great and irreparable injury of said land hereinbefore described, and to the great and irreparable injury of other lands belonging to the United States adjacent to such described land, have extracted, produced, converted and appropriated to [4] their own use, from the land hereinbefore described, and other lands adjacent thereto belonging to the United States, large quantities of petroleum oil and gas, the exact quantities of which petroleum oil and gas so extracted, produced, converted and appropriated, and the value thereof, this plaintiff is unable to state; and said defendants, California Midway Oil

Company, Associated Oil Company, Columbus Midway Oil Company, 32 Oil Company, L. B. McMurtry, and J. M. McLeod, are now continuing so to do, and are threatening to, and will hereafter continue so to do, to the further great and irreparable injury of said land, and to the further great and irremediable damage of this plaintiff, if they are not prevented and restrained from so doing by the proper orders of this Honorable Court.

VIII.

The said defendants, California Midway Oil Company, Associated Oil Company, Columbus Midway Oil Company, 32 Oil Company, L. B. McMurtry, and J. M. McLeod, have drilled, maintained, and operated oil and gas wells on said above-described land, and have extracted and produced petroleum oil and gas from such wells in an unskilled, negligent, careless and unworkmanlike manner so as to cause the inflow of large, unnecessary and unreasonable quantities of water into such wells, and into the oil sands and oil reservoirs in which the petroleum oil and gas are contained in such land, in such manner, and to such an extent, and in such quantities as to cause such water to infiltrate, saturate and impregnate such oil sands and reservoirs, and the petroleum oil and gas therein, to the great and irremediable damage of this plaintiff, and to the great and irreparable injury of said land, and the petroleum oil and gas deposits therein; but as to the exact extent and amount of such damage this plaintiff has no knowledge, and cannot here state; and said defendants

are now continuing so to do, and are [5] threatening to, and will hereafter continue so to do, to the further great and irremediable damage of this plaintiff, and to the further great and irreparable injury of said land, and to the complete extermination and destruction of the petroleum oil and gas deposits therein, if they are not prevented and restrained from so doing by the proper orders of this Honorable Court.

IX.

Of the petroleum oil and gas heretofore extracted, appropriated, converted and produced in the manner and for the purposes stated in paragraph VII of this bill, large quantities have been used, consumed and wasted by the said defendants, California Midway Oil Company, Associated Oil Company, Columbus Midway Oil Company, 32 Oil Company, L. B. McMurtry, and J. M. McLeod and other large quantities have been sold and delivered by the defendants, California Midway Oil Company, Associated Oil Company, Columbus Midway Oil Company, 32 Oil Company, L. B. McMurtry, and J. M. McLeod, to the defendant, Standard Oil Company, and other large quantities have been sold and delivered to other persons and corporations whose names are to this plaintiff unknown, and cannot for that reason be here stated, but as to the exact quantities of petroleum oil and gas so converted, appropriated, used, consumed, sold and delivered, and as to the value thereof, and as to the prices received for such quantities thereof as have been sold and delivered, this plaintiff is unable to

state, and because it has no knowledge thereof and has no means of ascertaining the facts in relation thereto except from defendants herein, therefore a full and complete discovery from said defendants in relation thereto is sought herein.

X. [6]

Each and all of the defendants herein claims some right, title or interest in said land, or in some part thereof, or in the petroleum oil or gas therein, or extracted therefrom, or by or through the purchase thereof, and each of which claims is predicated upon or claimed directly or mediately through or under a pretended mining location under the style of "Montana Placer Mining Claim," which said location purported and falsely pretended to have been on and for the land herein specifically described, on the 1st day of January, 1909, by and in the names of, and for the exclusive use and sole benefit of H. E. Bashore, R. B. Welch, W. A. Keenan, William Mahr, Herbert M. Walker, Eugene Metz, F. H. Romaine, Jr., and C. Rupert Walker (whose Christian names except as here stated are unknown to, and cannot be here further stated by this plaintiff) as a pretended association of eight persons acting as locators and under and through a pretended notice of such pretended location, which at the request and through the unauthorized and fraudulent procurement of one L. B. McMurtry (whose Christian name is unknown to and cannot be here stated by this plaintiff), spread upon the mining records of the county in which said land is located, on the 5th day of January, 1909.

That none of said defendants has acquired, or could acquire, and cannot now rightfully and lawfully assert any right, title or interest in and to the said land, or in and to the petroleum oil or gas therein, or in or to any of the petroleum oil or gas heretofore extracted and produced therefrom under and by reason of said pretended location or said pretended notice thereof, for the reason that said pretended location and pretended notice thereof were unlawful, fraudulent, invalid, and have no effect either in law or in equity, because said pretended location was not made and said pretended notice was not caused to be recorded by said pretended locators or by [7] any of them acting in their own proper persons, or through or by any person duly authorized so to do by them, and the said pretended location was not made and the said pretended notice was not recorded in the interest of or for the benefit and use of said pretended locators, or any of them, either individually or as an association, but said pretended location was in truth and in fact made, and the said pretended notice was in truth and in fact caused to be spread upon the said mining records by said L. B. McMurtry, under and through mesne conveyances from whom the said defendants now assert said claims, unlawfully, fraudulently, secretly, and without the knowledge and consent, direction, sanction or subsequent ratification of said pretended locators, or any of them, for the exclusive use and benefit and in the sole interest of the said L. B. McMurtry, or some other person than said persons whose names were so used, and with and for the sole and only purpose and in-

tent by such device, fraud, and concealment to secure to said L. B. McMurtry, and his assigns, or to some other person than such persons whose names were so used unlawfully and in violation of, and in fraud of the rights of this plaintiff, and in violation of Section 2331 of the Revised Statutes of the United States and the other laws of the United States, a greater area of mineral land than it was lawful at the date of such pretended location, or at the present time, to be embraced in a single location by the said L. B. McMurtry, or by any one individual person or corporation, or by an association of persons composed of a less number than eight persons, severally qualified to make a mining location.

XI.

Except as in this bill stated, the plaintiff has no other knowledge or information concerning the nature of any other claims asserted by the defendants herein, or any of them, and therefore leaves said defendants to set forth their respective [8] claims and interests.

In that behalf plaintiff alleges, because of the premises of this bill, that none of the defendants has ever had or now has any right, title or interest in or to, or any lien upon, said land, or any part thereof, or any right, title or interest in or to the petroleum, mineral oil, or gas deposited therein, or any right to extract petroleum, gas or other minerals from said land, or to convert or dispose of the petroleum oil or gas so extracted, or any part thereof; on the contrary, the acts of these defendants who have entered upon said land and drilled oil

and gas wells thereon and used and appropriated the petroleum oil and gas deposited therein, and assumed to sell and convey any interest in or to any part of said land, or any part of the petroleum oil or gas extracted therefrom, were all in violation of the laws of the United States and of the aforesaid order of withdrawal, and all of said acts are in violation of the rights of the plaintiff herein, and such acts interfere with the execution by the plaintiff of its public policies with respect to said land and the petroleum oil and gas therein, as hereinbefore set forth.

XII.

The present value of the land hereinbefore described exceeds Four Hundred Thousand Dollars ($400,000.00).

In consideration of the premises thus exhibited, and inasmuch as plaintiff herein is without full and adequate remedy in the premises save in a court of equity, where matters of this nature are properly cognizable and relievable, plaintiff prays:

1. That the said defendants, and each of them, may be required to make full, true and direct answer, respectively, to all and singular the matters and things hereinbefore stated and charged, and to fully disclose and state their claims to said [9] land hereinbefore described, and to any and all parts thereof, as fully and particularly as if they had been particularly interrogated thereunto, but not under oath, answer under oath being hereby expressly waived.

2. That the said land may be declared by this

Court to have been at all times from and after the 27th of September, 1909, lawfully withdrawn from mineral exploration, and from all forms of location, settlement, selection, filing, entry, or disposal under the mineral and nonmineral public land laws of the United States; and that the said location notice was fraudulently filed, and the said defendants did not acquire any rights thereunder.

3. That said defendants, and each of them, may be adjudged and decreed to have no estate, right, title, interest or claim in or to said land, or any part thereof, or in or to any mineral or mineral deposits contained in or under said land, or any part thereof; and that all and singular of said land, together with all of the minerals and mineral deposits, including mineral oil, petroleum and gas therein or thereunder contained, may be adjudged and decreed to be the perfect property of this plaintiff, free and clear of the claims of said defendants, and each and every one of them.

4. That each and all of the defendants herein, their officers, agents, servants and attorneys, during the progress of this suit, and thereafter, finally and perpetually, may be enjoined from asserting or claiming any right, title, interest, claim or lien in or to the said land, or any part thereof, or in or to any of the minerals, or mineral deposits therein, or thereunder contained; and that each and all of the defendants herein, their officers, agents, servants and attorneys, during the progress of this suit, and thereafter, finally and perpetually may be enjoined from going upon any part or portion of said

land, and [10] from in any manner using any of said land and premises, and from in any manner extracting, removing or using any of the minerals deposited in or under said land and premises, or any part or portion thereof, or any of the other natural products thereof, and from in any manner committing any trespass or waste upon any of said land or with reference to any of the other natural products thereof.

5. That an accounting may be had by said defendants and each and every one of them, wherein said defendants, and each and every one of them, shall make a full, complete, itemized and correct disclosure of the quantity of minerals (and particularly gas and petroleum) removed or extracted, or received by them, or either of them, from said land, or any part thereof, and of any and all moneys or other property, or thing of value received from the sale or disposition of any and all minerals extracted from said land, or any part thereof, and of all rents and profits received under any sale, lease, transfer, conveyance, contract or agreement concerning said land, or any part thereof; and that the plaintiff may recover from said defendants, respectively, all damages sustained by the plaintiff in these premises.

6. That a receiver may be appointed by this Court to take possession of said land and of all wells, derricks, drills, pumps, storage vats, pipes, pipe-lines, shops, houses, machinery, tools and appliances of every character whatsoever thereon, belonging to or in the possession of said defend-

ants, or any of them, which have been used or now are being used in the extraction, storage, transportation, refining, sale, manufacture, or in any other manner in the production of gas, petroleum or petroleum products or other minerals from said land, or any part thereof, for the purpose of continuing, and with full power and authority to continue the operations on said land in [11] the production and sale of gas, petroleum and other minerals where such course is necessary to protect the property of the plaintiff against injury and waste, and for the preservation, protection and use of the oil and gas in said land, and the wells, derricks, pumps, tanks, storage vats, pipes, pipe-lines, houses, shops, tools, machinery and appliances being used by the defendants, their officers, agents, or assigns in the production, transportation, manufacture or sale of gas, petroleum or other minerals from said land, or any part thereof, and that such receiver may have the usual and general powers vested in receivers of courts of chancery.

7. That the plaintiff may have such other and further relief as in equity may seem just and proper.

To the end, therefore, that this plaintiff may obtain the relief to which it is justly entitled in the premises, may it please your Honors to grant unto the plaintiff a writ or writs of subpoena, issued by and under the seal of this Honorable Court, directed to said defendants herein, to wit: California Midway Oil Company, Associated Oil Company, Columbus Midway Oil Company, 32 Oil Company,

L. B. McMurtry, J. M. McLeod, and Standard Oil Company, therein and thereby commanding them, and each of them, at a certain time, and under a certain penalty therein to be named, to be and appear before this Honorable Court, and then and there, severally, full, true and direct answer make to all and singular the premises, but not under oath, answer under oath being hereby expressly waived, and stand to perform and abide by such order, direction and decree as may be made against them, or any of them, in the premises, and as shall be meet and agreeable to equity. [12]

THOMAS W. GREGORY,
Attorney General of the United States.
ALBERT SCHOONOVER,
United States District Attorney.
E. J. JUSTICE,
Special Assistant to Attorney General.
A. E. CAMPBELL,
Special Assistant to Attorney General.
FRANK HALL,
Special Assistant to Attorney General. [13]

United States of America,
Northern District of California,
State of California,—ss.

George Hayworth, being first duly sworn, deposes and says:

He is now and has been since the 1st day of February, 1914, Chief of Field Division of the General Land Office at San Francisco, California, and prior to that time was, since July, 1910, a Special Agent of the General Land Office, doing field work

in California, and much of said work has been done in the investigation of facts relating to the lands withdrawn by the President as oil lands, and especially the lands withdrawn by order of September 27th, 1909, and by the order of July 2d, 1910.

That from examination of such land, or the facts in relation thereto, obtained by him or by special agents acting under his direction as such chief of Field Division, and from examinations of the records of the General Land Office, and the local land offices of plaintiff in said State of California, he is informed as to the matters and things as stated in the complaint with reference to the particular lands therein described; and the matters therein stated are true, except as to such matters as are alleged upon information and belief, and as to those, affiant after investigation, states that he believes them to be true.

GEO. HAYWORTH.

Subscribed and sworn to before me this 2d day of March, 1917.

[Seal] J. L. BALDWIN,

Deputy Clerk U. S. District Court, Northern District of California. [14]

[Endorsed]: In Equity—No. B–10. In the District Court of the United States for the Southern District of Calif., Northern Division. United States of America, Plaintiff, vs. California Midway Oil Co. et al., Defendants. Amended Bill of Complaint. Filed Mar. 5, 1917. Wm. M. Van Dyke,

Clerk. By R. S. Zimmerman, Deputy Clerk. E. J. Justice, A. E. Campbell, and Frank Hall, Attorneys for Plaintiff. [15]

---

In the District Court of the United States for the Southern District of California, Northern Division, Ninth Circuit.

IN EQUITY—No. B-10.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CALIFORNIA MIDWAY OIL COMPANY, ASSOCIATED OIL COMPANY, COLUMBUS MIDWAY OIL COMPANY, 32 OIL COMPANY, J. M. McLEOD and STANDARD OIL COMPANY,

Defendants.

**Answer of California Midway Oil Company.**

Comes now defendant California Midway Oil Company, and severing from its codefendants, answers the purported bill in equity of the plaintiff herein as follows:

I.

This defendant alleges that the said purported bill in equity does not state facts sufficient to entitle plaintiff to the relief sought in and by its said bill, nor facts sufficient to give this Court jurisdiction in equity of plaintiff's claim therein urged; but to the contrary, the facts alleged in said bill, if sufficient to state a cause of action at all against

this defendant, states a cause of action at law and in ejectment whereby plaintiff seeks to recover the possession of the real property mentiond in paragraph II of said bill, with the mesne profits thereof.

II.

This defendant denies that either on September 27th, 1909, or at any time since said date, or at any time subsequent [16] to on or about January 1st, 1909, plaintiff has been entitled to the possession of the land described in paragraph II of its bill, or to the possession of any of the oil, or petroleum, or gas, or other minerals contained in said land; and defendant denies that at any of said times plaintiff has been or now is the owner of any of the oil, petroleum, gas or other minerals contained in said land, or the owner of said land at all, otherwise than subject to the right of possession of said land and the right to extract and remove all minerals therein of H. E. Bashore, R. B. Welch, W. A. Keenan, William Mahr, Herbert M. Walker, Eugene Metz, F. H. Romaine, Jr., and C. Rupert Walker all of whom at the time of entry and location hereinafter mentioned were duly qualified persons, entitled to locate mineral claims upon the public domain of the United States, and who on or about January 1st, 1909, lawfully and peaceably entered in and upon said land under and by virtue of the mineral laws of the United States, and pursuant to the invitation extended to them so to do by said laws, and took possession thereof, for the purpose of prospecting said land and the discovery of valuable mineral deposits thereon and

therein, and who did January 1st, 1909, validly locate said land under and pursuant to the provisions of the said mineral laws of the United States, as a placer mining claim, named "Montana Placer Mining Claim," for the purpose of developing petroleum, gypsum, and other minerals therein and thereon, and subject to the right of certain of the defendants herein, lawfully acquired by said defendants respectively from and under said locators.

III.

This defendant denies that on the 27th day of September, 1909, the President of the United States, whether acting by or through the Secretary of the Interior, or acting otherwise, or under any authority legally invested in him so to do, either duly or regularly withdrew or reserved any of the land described in [17] the said bill, either from mineral exploration or from all or any forms or form of location, settlement, selection, filing, entry, patent, occupation or disposal, under the mineral or nonmineral land laws of the United States or that since last-named date said land or any portion thereof has not been subject to exploration for mineral oil, petroleum or gas, or to occupation, or to the initiation or maintenance of any right under the public land laws of the United States. But to the contrary, this defendant alleges that on September 27th, 1909, and at all times since said date, the said land and the whole thereof was and has been in the lawful possession of the locators thereof named in paragraph II of this answer, and

of the various persons lawfully claiming under and in the right of said locators, and has been open as to all said persons to mineral exploration, location, occupation and disposal under the mineral laws of the United States, to the maintenance of the rights of said locators under said mineral laws, and of the rights of persons claiming under said locators; all of which rights of said locators were lawfully acquired by virtue of said location prior to said 27th day of September, 1909.

This defendant alleges that the withdrawal order of September 27th, 1909, mentioned and referred to in plaintiff's bill, with the exception of the description of the lands purported to be affected thereby, is in the words and figures following, to wit:

"TEMPORARY PETROLEUM WITHDRAWAL No. 5.

In aid of proposes legislation affecting the use and disposition of the petroleum deposits on the public domain, all public lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or nonmineral public land laws. All locations or claims existing and valid on this date may proceed to entry in the usual manner after field investigation and examination";

and that on September 27th, 1909, and prior to said date, this defendant, California Midway Oil Company, was actually in the possession and occupation of the real property described in plaintiff's [18] bill of complaint, and was engaged therein and

thereon in the diligent prosecution of work leading to the discovery of oil and gas thereon; that such occupation and work on the part of this defendant was had and carried on under and by virtue of rights acquired by this defendant from and through said locators of said "Montana Placer Mining Claim"; that said "Montana Placer Mining Claim" was, at the date of said withdrawal order, had been theretofore, was at all times thereafter, and now is, an existing and valid location and claim, and as such not affected by the said withdrawal order under and by virtue of its own terms.

This defendant denies that, in violation either of the proprietary rights of plaintiff, or of any other rights of plaintiff, or in violation of any law of the United States, or any lawful order or lawful proclamation of the President of the United States, or in violation of any alleged order of withdrawal of the President of the United States, made September 27th, 1909, or at any other date, or in disregard of or contrary to, or by infringement upon the governmental policy adopted by the United States for the protection, conservation, disposal and use of the petroleum, oil and gas contained in said land, the said defendants California Midway Oil Company, Associated Oil Company, Columbus Midway Oil Company, 32 Oil Company, J. M. McLeod, and Standard Oil Company, or either or any of said defendants entered upon said land described in plaintiff's bill, at any time for the purpose of prospecting or exploring said land for petroleum or for gas or for

any other purpose; and this defendant further denies that said defendants, or either or any of said defendants, or the predecessors in interest of said defendants, entered upon said land or any portion thereof subsequent to September 27th, 1909, for any purpose whatever.

Admits that this defendant, subsequent to September 27th, 1909, extracted, produced and converted to its own use certain [19] oil and gas which had been discovered by it on and in said described land prior to September 27th, 1909, and this defendant alleges that it had the right so to do.

IV.

This defendant denies that it and the aforementioned locators of the "Montana Placer Mining Claim" had not discovered minerals open to discovery and location under the mineral laws of the United States on said land prior to September 27th, 1909, and denies that this defendant had acquired no rights on or with respect to said land on or prior to said date. This defendant for answer further alleges that prior to the said 27th day of September, 1909, this defendant, California Midway Oil Company, had acquired said rights to said land under, through and from said locators of said "Montana Placer Mining Claim"; that prior to said 27th day of September, 1909, this defendant, California Midway Oil Company, had been, and on said date was in the actual and diligent prosecution on said land of work leading to the discovery of oil and gas thereon, and was on said date a *bona fide* occupant and claimant of said land, and in the

diligent prosecution of the work aforesaid, and thereafter continued in the prosecution of such work to the discovery and production of oil and gas on said land.

V.

Denies that at any time after said land had been withdrawn from prospecting, exploration or entry, the defendants California Midway Oil Company, Associated Oil Company, Columbus Midway Oil Company, 32 Oil Company, and J. M. McLeod, or either or any of said defendants drilled oil or gas wells on said land for the extraction, production, conversion, or appropriation of petroleum, oil and gas therefrom, in violation of the proprietary rights of the plaintiff therein, or in violation of the laws of the United States, or of any proclamation or order issued [20] by the President of the United States, or particularly in violation of said order of withdrawal of September 27th, 1909.

Denies that this defendant at any time in disregard of, or contrary to, or by infringement upon the general governmental policies adopted and declared by the United States for the protection, conservation, use and disposal of petroleum, oil and gas in the land hereinbefore particularly described, and in other lands belonging to the United States, to the great and irremediable damage of the plaintiff, or to the great and irreparable injury of said land hereinbefore described, or to the great and irreparable injury of other lands belonging to the United States adjacent to said described land, has extracted, produced, converted or appropriated to

its own use from the land hereinbefore described, or other lands adjacent thereto belonging to the United States, large or any quantities of petroleum, oil or gas, and this defendant further alleges that plaintiff neither has nor lawfully can have any policies with respect either to the conservation, or to the use, or to the disposition of said land, or of the petroleum, or oil, or gas contained therein, for the reason that, pursuant to the policies long declared by the Congress of the United States with respect to the public mineral lands of the United States and the disposition thereof, as declared by the acts of Congress relating thereto, the said locators of the said "Montana Placer Mining Claim" had lawfully located the said land and the whole thereof, prior to said alleged withdrawal order, and to any alleged change in said policies, and that said defendants California Midway Oil Company, Associated Oil Company, Columbus Midway Oil Company, 32 Oil Company, J. M. McLeod, and Standard Oil Company, are each lawfully in the possession of portions of said land, claiming under and by virtue of said location.

The defendant denies that defendants California Midway Oil [21] Company, Associated Oil Company, Columbus Midway Oil Company, 32 Oil Company, J. M. McLeod, and Standard Oil Company, or either or any of them are in any wise trespassing upon said land, or that either petroleum, oil or gas will be wrongfully taken by said named defendants, or either or any of them therefrom, or that said defendants, or either or any of

them will commit trespass or waste upon said land, to the irreparable or any injury of said land, or to the great or any damage to plaintiff.

VI.

Admits that this defendant California Midway Oil Company has drilled, maintained and operated oil and gas wells on said above-described land, but this defendant denies that it has extracted and produced, or extracted or produced petroleum, oil or gas from any of said wells in an unskilled, or negligent, or careless or unworkmanlike manner, so as to cause the inflow of large or unnecessary or unreasonable quantities of water into said well or wells, or into the oil sands, or oil reservoirs, in which petroleum, oil and gas are contained in said land, in such manner, or to such an extent, or in such quantities as to cause such water to infiltrate or saturate or impregnate any of said oil sands or reservoirs, or the petroleum or oil or gas therein, to the great or any damage of plaintiff, or to the great or irreparable or any injury of said land, or to the petroleum, or oil or gas deposits therein.

Denies that this defendant is now continuing so to do, or is threatening to or will at any time hereafter continue so to do, to the further great and irremediable or any damage to plaintiff, or to the further great or irreparable or any injury to said land, or to the complete or any extermination or destruction of the petroleum or oil or gas deposits therein.

VII.

This defendant admits that of the oil produced from [22] wells drilled by it on the said described land, certain quantities of the same have been used by it upon said land for fuel purposes, and the remainder sold, but this defendant alleges that no petroleum or oil or gas whatever has been wasted by it in its operations.

VIII.

Denies that each or any of the claims of the defendants herein, or either or any of them, is predicated upon or claimed directly or mediately through or under any pretended mining location, under the style of "Montana Placer Mining Claim" or any other style.

It is not true that said location purported and falsely pretended to have been on and for the land herein specifically described, on the 1st day of January, 1909, by and in the names of and for the exclusive use and sole benefit of H. E. Bashore, R. B. Welch, W. A. Keenan, William Mahr, Herbert M. Walker, Eugene Metz, F. H. Romaine, Jr., and C. Rupert Walker, as a pretended association of eight persons acting as locators, or under or through a pretended notice of such pretended location, which was, at the request or through the unauthorized and fraudulent procurement of one L. B. McMurtry, spread upon the mining records of the county in which said land is located, on the 5th day of January, 1909.

It is not true that not any of said defendants have acquired or could acquire, or cannot now law-

fully or rightfully assert any right, title or interest in and to the said land, or in and to the petroleum, oil or gas therein, or in or to any of the petroleum, oil or gas heretofore extracted or now being extracted, or which shall hereafter be extracted and produced therefrom under and by reason of the location of said "Montana Placer Mining Claim" or the notice thereof.

It is not true that said location and the notice thereof [23] were unlawful, or fraudulent or invalid, or have no effect either in law or in equity. It is not true that said location was not made and said notice was not caused to be recorded by such locators, or by any of them, acting in their own proper persons, or through or by any person duly authorized so to do by them.

It is not true that the said location was not made and the said notice not recorded in the interest of, or for the benefit or use of such locators, or any of them, either individually or as an association.

It is not true that such location was in truth and in fact made, and said notice in truth and in fact caused to be spread upon the said mining records by said L. B. McMurtry unlawfully or fraudulently or secretly, or without the knowledge, or consent, or direction, or sanction, or subsequent ratification of said locators, or any of them, for the exclusive use and benefit, and in the sole interest of said L. B. McMurtry, or some other person than said persons whose names appear on said location notice, or with or for the sole and only purpose and intent, by device, or fraud or concealment to

secure to the said L. B. McMurtry and his assigns, or to some other person than such persons whose names appear on said location notice, in violation and in fraud of the laws of the plaintiff, or in violation of section 2331 of the Revised Statutes of the United States, and the other laws of the United States, a greater area of mineral land than it was lawful at the date of said location, or at the present time, to be embraced in a single location, by the said L. B. McMurtry, or by any one individual person or corporation, or by an association of persons composed of a less number than eight severally qualified to make a mining location.

It is not true that this defendant asserts any claim of title to said land or any portion thereof deraigned or [24] through mesne conveyances from said L. B. McMurtry, but, on the contrary, this defendant alleges that it asserts title to a portion of said described land deraigned and by mesne conveyances from the said locators thereof, to wit, H. E. Bashore, R. B. Welch, W. A. Keenan, William Mahr, Herbert M. Walker, Eugene Metz, F. H. Romaine, Jr., and C. Rupert Walker.

IX.

It is not true that because of the premises of said bill of complaint, this defendant has never had, or has not now, any right, title or interest in or to, or any lien upon said land or any part thereof, or any right, title or interest in or to the petroleum, mineral oil or gas deposited therein, or any right to extract petroleum, gas or other minerals from said land, or to convert or dispose

of the petroleum or oil or gas so extracted, or any part thereof.

It is not true that any act of this defendant in connection with said land, either in the drilling of oil or gas wells thereon, or the use or appropriation of the petroleum, oil or gas deposited therein, or the assumption to sell or convey any interest in or to any part of said land, or any part of the petroleum, oil or gas extracted therefrom, was or is in violation of any law of the United States, or of the aforesaid order of withdrawal.

It is not true that any act of this defendant in connection with said land has been or is in violation of the rights of the plaintiff herein. It is not true that any such act or acts interfere with the execution by the plaintiff of its public policies or policy with respect to said land, or petroleum, oil or gas therein.

X.

This defendant further alleges that at all times on or since September 27th, 1909, plaintiff has had both notice and [25] knowledge, and has been fully aware that this defendant was in possession of a portion of said land, and was at large expense engaged in the prosecution of drilling for oil and producing oil therefrom. That for more than seven years immediately prior to the bringing of this action, plaintiff has had both notice and knowledge, and has been fully aware that this defendant was in possession of a portion of said land, and drilling thereon for the production of oil therefrom, and producing oil therefrom. That plaintiff

has wilfully and purposely lain by and made no objection whatever to the operations on said land of any of the defendants named herein, and has purposely suffered said defendants to expend large sums of money in the development of said land, for the production of oil therefrom, without in anywise objecting to said possession, or indicating to any of said defendants that plaintiff claimed that the possession of said land was in anywise contrary to law, or in violation of any rights of plaintiff; that said defendants relied on said acquiescence on plaintiff's part, and expended said moneys in reliance thereon, and this defendant alleges that this plaintiff is and ought to be thereby estopped from maintaining this action.

*X.*

That by the Act of Congress of the United States of February 11th, 1897, chapter 216, said Congress of the United States declared that all the public lands of the United States, containing petroleum or other mineral oils, and chiefly valuable therefor, were free and open to occupation, exploration and purchase by citizens of the United States and those who had declared their intention so to be; and that thereby the Congress of the United States extended to its citizens and to those persons who had declared their intention of becoming such citizens, an invitation to enter upon said public lands, to occupy and explore the same, and in the event of such occupation and exploration [26] demonstrating that said lands were chiefly valuable for petroleum or other mineral oils, to purchase said lands, as provided in and by the laws

of the United States and the regulations of the Department of the Interior and the General Land Office of the United States prescribed pursuant to law. That, relying upon said invitation and on or about January 1st, 1909, the aforesaid locators of said "Montana Placer Mining Claim" believing that the lands described in plaintiff's bill contained petroleum or other mineral oils and were chiefly valuable therefor, entered upon and occupied said lands and entered upon the exploration thereof for the purpose of determining whether the said belief on their part was well founded; that said locators made the location of said "Montana Placer Mining Claim" as hereinbefore alleged; that the defendants California Midway Oil Company, Associated Oil Company, Columbus Midway Oil Company, 32 Oil Company, and J. M. McLeod claim said land, or some title thereto or interest therein, under and by virtue of said location, and all of said claims are derived, mediately or immediately, from and through said locators; that relying upon said invitation of the Congress of the United States, and prior to September 27, 1909, this defendant expended in improvements on the said land, which improvements were necessary for the exploration thereof for the discovery of petroleum or other mineral oils, a sum in excess of twenty thousand dollars, and this defendant California Midway Oil Company has expended as the purchase price for the sixty acres claimed by it in said northwest quarter of section 32, township 31 south, of range 23 east, M. D. M., the sum of sixty thousand dollars, and has expended in the explora-

tion of said described portion of land and in the drilling of wells thereon for the discovery and production of petroleum, oil therefrom, a sum aggregating one hundred and thirty thousand dollars, making a total expenditure by this defendant of one hundred and [27] ninety thousand dollars; that all of said expenditures were made on the faith of and in reliance upon the said invitation of Congress extended in and by the said Act of February 11, 1897; that thereby plaintiff is and ought to be estopped from maintaining this action.

XI.

That for more than seven years prior to the bringing of this action, the defendants California Midway Oil Company, Associated Oil Company, Columbus Midway Oil Company, 32 Oil Company, and J. M. McLeod have been in the lawful and peaceable possession of all of the land described in plaintiff's bill, and continuously working the same as a mining claim under, by virtue of and in the right of the said "Montana Placer Mining Claim" location, without objection, let or hindrance on the part of plaintiff; that during all of said seven year period, plaintiff has been fully informed and has known of said occupation and working of said land by said defendants; that said plaintiff was on the 27th day of September, 1909, fully familiar with and cognizant of the condition of said land and all operations thereon looking to the development and discovery of oil and other minerals therein; and that from on or about January 1st, 1910, and while drilling and other operations involving an extensive outlay of money on said

land were in progress, various officers and agents of plaintiff, whose duty it was to examine and inspect said land, visited the same, and particularly visited and inspected the work then in progress by this defendant; and that at no time prior to the filing of the bill of complaint in this action did said officers or agents of the plaintiff, or either or any of them object to or in any manner protest against the operations being carried on by this defendant. That throughout all of said time it was the fact, and said officers and agents of said plaintiff knew it to be the fact, that if in the course of said operations, and as a result of the [28] expenditures being made in pursuance thereof as aforesaid, oil was discovered, the same would be brought to the surface and disposed of in the ordinary course of trade. That among the officers of the United States who so visited the said land during the time as aforesaid, and were cognizant of and familiar with all of the facts with reference thereto as aforesaid, and particularly with reference to the operations thereon and expenditures being made in pursuance thereof as aforesaid, were the Assistant Secretary of the Interior of the United States, the Commissioner of the General Land Office of the United States, the chief of the Field Division of the General Land Office of the United States, and various and sundry special agents of the Field Service of the General Land Office of the United States. That each, every and all of said officers and agents of the plaintiff who visited said land as aforesaid, did, as this defendant is informed and believes, and therefore alleges the fact to be, make written report to

the Department of the Interior of the United States with reference to the condition of said land and the operations thereon, from time to time, during the course of said visits, and, as this defendant is informed and believes and therefore alleges the fact to be, said Chief of the Field Division of the General Land Office, and Special Agents of said Field Service of the General Land Office, especially inquired of their superior officers, to wit, the Secretary of the Interior and the Commissioner of the General Land Office as to whether any objection should be made to said operations on said land and the expenditures being made pursuant thereto, and that said Chief of Field Division and Special Agents were instructed not to make any objection or protests against said operations, and that no protest or objection was ever made, but, on the contrary, said officers, by their acts and conversations upon the ground, approved of said operations, and this defendant believes honestly [29] and in good faith, that said operations met with the approval of said officers.

That as this defendant is informed and believes, and therefore alleges the fact to be, said officers and agents of the plaintiff, at the times of their visits to said land when production of oil was in progress thereon, obtained and secured correct and accurate data with reference to the quantity of oil produced, the persons to whom the same was sold, and the amount received therefor, and, as this defendant is informed and believes, and therefore alleges the fact to be, said plaintiff is now, was at the time of the filing of the complaint herein, and at all times has

been, in full possession of all the facts with reference to the production of oil from said land and the disposition thereof, and the price received therefor. That by reason of the facts alleged in this paragraph plaintiff is, and ought to be, estopped from maintaining this action.

XII.

That, as this defendant is informed and believes, and therefore alleges the fact to be, defendants California Midway Oil Company, Associated Oil Company, Columbus Midway Oil Company, 32 Oil Company, and J. M. McLeod, and each of said defendants at the various times required by law, made report and return to the plaintiff as to their respective incomes for the years 1910, 1911, 1912, 1913, 1914, 1915 and 1916 and that in and by said reports and returns there was included all proceeds received by them respectively from sales of oil produced from the land described in plaintiff's bill; that plaintiff knew that such returns included the said proceeds of sale; that with such knowledge on the part of plaintiff, plaintiff levied and assessed income taxes against each of said defendants upon their respective incomes for the said years, including the income received by each of said defendants from said sales of oil produced from said land described in plaintiff's bill, and that said defendants respectively [30] paid plaintiff said taxes, which were received by plaintiff with the knowledge on its part above alleged; that each of said defendants paid plaintiff the said taxes, relying upon plaintiff's acquiescence and acknowledgment, as

shown by its assessment of said taxes against said defendants, in the legality of said defendants' possession and occupation of said land, and the legality of said defendants' title to the oil extracted therefrom; that had not said defendants been induced thereto by plaintiff's acceptance of said reports and returns, and its imposition of taxes upon said proceeds of oil sales as evidencing plaintiff's acquiescence in the legality of said defendants' occupation of said land and title to the oil extracted therefrom, said defendants would not have paid said taxes; and by reason of such reports and returns, assessment and payment of taxes, plaintiff is, and ought to be, estopped from maintaining this action.

XIII.

That this defendant shortly after the issuance of the said withdrawal order of September 27th, 1909, consulted its attorney and counsellor, who was learned in the law, and recited to him all of the facts with reference to the location of said "Montana Placer Mining Claim" and the work done under said location, and all of the facts attendant upon the acquisition by this defendant of the title to said location, and inquired of its said attorney and counsellor with respect to the effect upon said location of the said withdrawal order, and said attorney and counsellor thereupon advised this defendant that said withdrawal order was invalid and ineffective should the same be claimed to relate to or affect the said land described in plaintiff's bill, that said location was a valid and subsisting location, and that the said locators, and their successors in interest, had the right to

occupy and possess said land and to drill and explore for oil therein and thereon and to appropriate [31] any oil discovered therein or thereon; that this defendant, acting and relying upon said advice and believing the same to be correct, honestly and in good faith and in the belief that it had the right to the possession of said land and to explore for oil thereon, continued in such possession and caused the work of drilling wells for oil thereon to be continuously prosecuted to the discovery of oil in such well; and that in all of its actions and conduct with reference to said land this defendant has acted in reliance upon and pursuant to the advice so given as aforesaid, in good faith, and believing the same to be correct.

WHEREFORE, this defendant prays that it may be declared by the judgment of this Court that the cause of action alleged by plaintiff in its said bill of complaint is a cause of action cognizable at law, and that said bill of complaint does not state any cause of action cognizable by a court of equity entitling plaintiff to relief by a court of equity; that this defendant have judgment that plaintiff take nothing by its said bill of complaint. But should the Court determine that said bill of complaint is sufficient to entitle plaintiff to be heard in a court of equity, then that the Court by its judgment shall decide and declare that plaintiff take nothing by its said bill, and that said bill be dismissed as to this plaintiff; that it be further declared by the decree of the Court that the location of the said "Montana Placer Mining Claim" was and is a valid location of the land described in

plaintiff's bill of complaint, under the placer mining laws of the United States; that said locators of said claim, and all persons lawfully claiming under them are entitled to possession of said land, and to develop the same for the minerals therein contained, and when found, to extract, remove and dispose of said minerals; that said locators and those lawfully claiming under them are also entitled to all and singular [32] such rights as are granted by the laws of the United States, and to a United States patent for the said "Montana Placer Mining Claim," and that this defendant in particular, by reason of its claim to occupation, and diligent prosecution of work upon, and expenditures of money in connection with, that portion of the land mentioned and described in plaintiff's bill of complaint, is entitled to the same, to wit, sixty acres, and that this defendant have such other and further relief as may be agreeable to equity, the premises considered.

GEO. E. WHITAKER,
Attorney for Defendant California Midway Oil Company. [33]

[Endorsed]: In Equity—No. B–10. In the District Court of the United States for the Southern District of California, Northern Division, Ninth Circuit. United States of America, Plaintiff, vs. California Midway Oil Company et al., Defendants. Answer of California Midway Oil Company. Filed June 15, 1917. Wm. M. Van Dyke, Clerk. R. S. Zimmerman, Deputy. Geo. E. Whitaker, Attorney

at Law, Bakersfield, California, Attorney for Defendant California Midway Oil Company. [34]

---

In the District Court of the United States for the Southern District of California, Northern Division, Ninth Circuit.

No. B-10—IN EQUITY.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CALIFORNIA MIDWAY OIL COMPANY, ASSOCIATED OIL COMPANY, COLUMBUS MIDWAY OIL COMPANY, 32 OIL COMPANY, L. B. McMURTRY, J. M. McLEOD, and STANDARD OIL COMPANY,

Defendants.

**Answer of Defendants Thirty-two Oil Company and J. M. McLeod.**

Come now the defendants Thirty-two Oil Company and J. M. McLeod, defendants in the above-entitled suit, and answer the amended bill of complaint herein as follows:

FIRST DEFENCE.

As and for their first defence herein these answering defendants herein admit, deny and allege:

I.

Admit that the defendants named in paragraph I of said amended bill of complaint are and were

corporations as therein alleged.

Admit that defendant J. M. McLeod is a citizen of the United States and a resident of the Southern District of California.

II.

Deny, that for a long time prior to or on September 27, 1909, or at all times since, or at any time, plaintiff has been, or now is, the owner, or entitled to the possession, of the following mineral oil and gas land, to wit:

> The Northwest Quarter (NW. ¼) of Section Thirty-two (32), Township Thirty-one (31) South, Range Twenty-three (23) East, Mount Diablo Base and Meridian, [35]

or of any part thereof, or of the petroleum, gas or any other mineral contained in said lands, or any part thereof. Admit that plaintiff is the holder of the naked title to said lands, but aver that such title is held subject to the rights and conditions in this answer hereinafter set forth.

III.

Admit that the President of the United States, then acting under claimed (but not legally invested) authority so to do, did, on September 27, 1909, by executive proclamation, made a withdrawal and reservation of certain areas of land, but deny that said order of withdrawal duly, or regularly, or at all, withdrew or reserved all or any of the land particularly described in said amended bill of complaint from mineral exploration, or from all or any forms of location, or settlement, selection, filing, entry, patent, occupation or

disposal, under the mineral and/or nonmineral lands laws of the United States, but, on the contrary, allege that at no time, did the President, or any other officer of the United States, either under authority of law or otherwise, withdraw said or any lands whatsoever from mineral exploration or occupation, and allege that said withdrawal did not affect or impair the rights of these defendants or of their predecessors in interest, or of those claiming by, through or under them or either of them in and to said lands, because, on September 27, 1909, and prior thereto, and at all times since, these defendants, their predecessors in interest, and those claiming by, through and under them, were *bona fide* occupants and claimants of said lands as oil and gas bearing lands, and were at said date, and at all times since, until the discovery of oil and gas in commercial quantities thereon, in diligent prosecution of work leading to discovery of oil and gas thereon, and that since said discovery the defendants have continuously remained in possession of said property, and have done each year the [36] annual assessment and development work thereon required by the mining laws of the United States, and in all that was done by these defendants and their predecessors and privies in interest, with reference to said land they acted fully in accordance with the regulations prescribed by law, and according to the local customs and rules of miners in said district.

IV.

Deny that, either in violation of the proprietary

and/or other rights of plaintiff, or in violation of the laws of the United States, or of any lawful order of the President of the United States, or in violation of the alleged order of withdrawal of September 27, 1909, or in disregard of, or contrary to, or by infringement upon any governmental policy then or thereafter adopted by the United States, for the protection, conservation, disposal and/or use of the petroleum, oil and/or gas contained in said land, or in lands belonging to the United States, these defendants, or any of the defendants herein, entered upon and/or took possession of the land hereinbefore described, at any time subsequent of the land hereinbefore described, at any time subsequent to September 27, 1909, for the purpose of prospecting, exploring, drilling oil wells for discovery, extracting, producing, converting, or appropriating to their own use, or to the use of any of them, petroleum, oil and/or gas therefrom. Deny that any of the defendants herein did so prospect, explore, drill wells for, or discover, extract, produce, convert or appropriate to their own use or to the use of any of them, oil or gas on September 27, 1909, or at any time subsequent thereto.

V.

Deny that none of the defendants herein had discovered petroleum oil, gas or other minerals on said northwest quarter prior to September 27, 1909. Allege that in May, 1909, [37] defendant California Midway Oil Company found and discovered oil in commercially paying quantities in a well

which it had drilled upon said northwest quarter.

VI.

Deny that none of said defendants was, on September 27, 1909, a *bona fide* occupant or claimant of said land, in diligent prosecution of work leading to discovery of oil or gas thereon or therein. Allege that these defendants long prior to September 27, 1909, had initiated rights on said land, their and that these defendants and ~~its~~ privies in interest, on September 27, 1909, were, and for a long time prior thereto had been, and ever since have been, *bona fide* occupants and claimants of said land, in open and notorious possession thereof, and at all said times, on, prior and for a long time subsequent to September 27, 1909, these defendants were engaged in diligent prosecution of work leading to discovery of oil and gas thereon, and, prior to September 27, 1909, had expended large amounts of money thereon, in acceptance of the public offer of plaintiff set forth in section 2319 of the Revised Statutes of the United States, and were, on and after September 27, 1909, actually engaged in the diligent prosecution of work leading to discovery of oil and gas thereon or therein, in accordance with the regulations then prescribed by law, and according to the local customs and rules of miners in said district.

VII.

Deny that long after or at any time after said alleged withdrawal order of September 27, 1909, any of the defendants herein drilled oil or gas wells

on said land for extraction, production, conversion, and/or appropriation of petroleum oil and/or gas therefrom, in violation of the proprietary or any rights of said plaintiff, and/or in violation of the laws of the United States, and/or in [38] violation of said alleged order of withdrawal of September 27, 1909, or in violation of any law or order, and/or in disregard of, contrary to, and/or infringement upon any governmental policy adopted and/or declared by the United States for the protection, conservation and/or disposal of petroleum oil or gas in said land, or in any lands alleged to belong to the United States, to the great and/or irremediable or to any damage of the plaintiff, and/or to the great and/or irreparable or to any injury of said land, or of other lands alleged to belong to the United States adjacent to said land, have extracted, produced, converted and/or appropriated to their own use, or at all, from the land hereinbefore described, or any lands adjacent thereto, any petroleum oil and/or gas.

Allege that these defendants and those claiming by, through and under them are in the lawful possession and occupation of the land hereinbefore described, and have produced and are now producing oil and gas therefrom in the ordinary and regular way, and have used and marketed said oil and gas in the ordinary course of their business, as the true and lawful owners thereof.

Allege that these defendants and those claiming by, through and under them will continue to operate their existing oil and gas wells upon said

land, but deny that such operation has caused, or that it can or will cause, great or irreparable injury or damage, or any damage whatever to said plaintiff. Allege that the operation of said wells and all of them is highly beneficial, and to discon*tue* or shut down the same would cause enormous loss and damage, to said land and to these defendants.

Deny that the amount of oil and gas produced and saved from said land is unknown to plaintiff, and allege [39] that same is fully known to plaintiff; that these defendants are informed and believe and therefore allege that said plaintiff has had every opportunity afforded it to ascertain the full production of said lands long prior to the commencement of this action, and has had at all times full information concerning the price and value of said oil and gas, and that there is not and never has been any occasion whatever for resorting to a court of equity, to ascertain either the amount or value of oil or gas produced from said land.

VIII.

Deny that the defendants in this suit or any of them, have drilled, maintained and/or operated oil and/or gas wells on the land hereinbefore described, *received/or* have extracted and produced petroleum oil and/or gas from such wells in an unskilled, negligent, careless and/or unworkmanlike manner so as to cause the inflow of any large, unnecessary and/or unreasonable quantity of water into such wells, or into the sands and/or oil reservoirs in which petroleum oil and/or gas are con-

tained in such land, in such or any manner or to such extent or in such or any quantities as to cause any water to infiltrate, saturate and/or impregnate such oil sands and/or reservoirs, and/or the petroleum oil and/or gas therein, to the great or irremediable or any damage to said land, or the petroleum oil and/or gas deposits therein.

Deny that the defendants in this suit or any of them are now continuing to cause great or irreparable or any damage or injury to said plaintiff or to said land, or to the complete or any extermination or destruction of the petroleum oil and/or gas deposits therein.

IX.

Deny that of the petroleum oil and gas heretofore extracted or produced from said land by the defendants or any [40] of them, large or any quantities have been wasted. Deny that large or any quantities have been sold or delivered to other persons or corporations whose names are to said plaintiff unknown, and cannot, for that reason, be stated in said amended bill of complaint. Deny that plaintiff is unable to state the amount, value, and/or quality of the said oil and gas which plaintiff claims to have been converted, appropriated, used, consumed, sold and/or delivered, and on its information and belief allege that none of the defendants has ever refused to furnish to the plaintiff all the information, records and data regarding said oil and gas and the disposition thereof, and the price and value thereof, which would be obtainable by or through the order of this

Court, and allege that the information freely tendered to plaintiff by each of said defendants, and never refused by any of them so far as these defendants are informed and believe, is full and adequate, and that there is no occasion or cause for any proceeding in this Court by way of discovery.

X.

Admit and allege that these defendants claim and have right, title and interest in all the hereinbefore described land, and in and to the petroleum oil and gas therein and extracted therefrom. Deny that such claim or right is predicated upon or claimed directly or indirectly or at all through or under any pretended mining location. Deny that the mining location referred to in paragraph X of said bill of complaint was or is a pretended location, or that the same falsely pretended to have been made on said land by or in the names of the persons referred to in paragraph X of said amended bill of complaint; deny that the said persons appearing as locators in said claim were or constituted a [41] pretended association of eight persons acting as locators, or under and through pretended notice of any pretended location. Deny that said placer mining location was, through the unauthorized or fraudulent proclamation of L. B. McMurtry, or of any other person, spread upon the Mining Records of the county in which said land is located; but, on the contrary, allege, on their information and belief, that said placer mining claim and location were duly and regularly made by and on behalf

of said locators, under written authority for such purpose, and that there was no agreement or understanding whatever that said location was or should be for the benefit of any other person or persons than said eight locators. Deny that said location or location notice was unlawful, fraudulent or invalid, or that the same has no effect, either in law or in equity, or that said notice was not made or caused to be recorded by said locators, through or by any person duly authorized so to do, and deny that said location was not made and said notice was not recorded in the interest of or for the benefit or use of said locators or any of them, either individually or as an association, and deny that said location was made and said notice was caused to be spread upon the Mining Records by said L. B. McMurtry, unlawfully, fraudulently, secretly, or without the knowledge or consent, direction, sanction or subsequent ratification of said locators, or that the same was for the exclusive use and benefit and in the sole interest of the said L. B. McMurtry or some other person than said persons whose names were so used, or that the same was for the interest at all of said McMurtry or of any other person or persons than said locators, and deny that said location was made with and for the sole and only purpose and intent, or with the purpose or intent at all, by such alleged device, [42] fraud or concealment, to secure to said L. B. McMurtry and his assigns, or to some other person than such persons whose names were so used, a greater area of mineral land than it was lawful, at the date of such location or

now, to be embraced in a single location by said L. B. McMurtry or by any one person or corporation, or by less than eight persons; and deny that said location was made unlawfully or in violation of or in fraud of the rights of the plaintiff, or in violation of Section 2331 of the Revised Statutes of the United States, or any other law of the United States.

On the contrary, these defendants, on their information and belief, allege that said several locators made and constituted said L. B. McMurtry their true and lawful attorney in fact, to locate for them and in their names, placer mining claims for oil; that said powers of attorney so executed by said locators were in writing, duly acknowledged and recorded; that said respective locators had no agreement or understanding whatever with said McMurtry, save and except as in said powers of attorney stated; that said locators had no purpose whatever to violate the laws of the United States, or to assist anyone else so to do, or to cheat or defraud either the United States or persons who should purchase upon the faith of their recorded powers of attorney and locations made thereunder; that each of said locators was of full age, a citizen of the United States and qualified to be a locator, and that said McMurtry had no arrangement whatever, either directly or indirectly, with said locators or either of them, that he should have any interest whatever in the locations which he should make, or that any other person except said locators should have any ownership therein. [43] Allege that these defend-

ants and each of them acquired their interest and rights in said lands upon the faith of the public records, in which appeared the power of attorney, duly and regularly made by each of said locators, and the location notice made, posted and recorded in accordance with the authority contained in said powers of attorney, and the conveyances made by said attorney in fact, in all respects as authorized by said recorded powers of attorney.

And these defendants allege that, after said locations had been made, and the fact known that enormous tracts of land had been located for them and in their names by the said attorney in fact, and that oil had been discovered upon said tracts, and contracts negotiated concerning the same, each of said several locators, in his own proper person, duly executed and acknowledged his written ratification of all that his said attorney in fact had done and of the binding force of said recorded power of attorney, which said ratification was made and executed in July or August of 1910.

Deny, on information and belief, that plaintiff, except as stated in said amended bill of complaint, has no knowledge or information concerning the nature of any other claims asserted by the defendants herein, or any of them.

Deny that none of said defendants has or ever has had any rights, title or interest in said land or any part thereof, or any right, title or interest in or to the petroleum, mineral oil or gas deposited therein, or any right to extract petroleum, gas or other minerals from said land, or to convey or dispose of the

petroleum or gas so extracted or any part thereof. Allege that these defendants and those claiming by, through and under them or either of them, have full right and title to said land, excepting only the naked legal title [44] thereto, held in trust by said plaintiff for said defendants.

Deny that the defendants who entered upon said land and drilled oil and gas wells thereon every "appropriated" any petroleum oil or gas deposited therein; and deny that any acts of the defendants, or any of them, with reference to said land and/or the mineral oil or gas deposited therein were in violation of the laws of the United States, or of said alleged order of withdrawal, or of any rights of the plaintiff, herein, and deny that the same interfered with the execution by said plaintiff of any public policies with respect to said land, or the petroleum oil or gas therein.

*XII.*

Deny that the present value of the land hereinbefore described exceeds $400,000.00. Allege that said land, prior to the improvements made thereon and for the benefit thereof by the defendants, was barren, desert land, and of virtually no value for any purpose; that it was not known or determined whether it had any value whatever for oil or gas; that the principal value which said land now has is due to the risk and chances taken by these defendants in sinking oil wells thereon, and in demonstrating that said property contains oil and gas in commercially paying quantities. [45]

SECOND DEFENCE.

As and for their second defence herein, defendants 32 Oil Company and J. M. McLeod admit, deny and allege:

I.

Repeat their said first defence herein and make the same a part hereof the same as though again fully set out herein.

II.

Allege that on January 1, 1909, the said northwest quarter was public land of the United States, open to location and purchase and unappropriated under the laws of the United States relating to land commonly known as "placer," and relating to lands containing petroleum and other mineral oils, and chiefly valuable therefor, and was at that time vacant public land.

Allege that on January 1, 1909, the eight persons named as locators in paragraph X of said bill of complaint, each of whom was then a citizen of the United States over the age of twenty-one, and all of whom had theretofore associated themselves together for the purpose of acquiring title to oil lands in Kern County, State of California, duly located said land under the name of "Montana Placer Mining Claim," and duly marked the same upon the ground, posted notice of said location upon said land, marked the boundaries thereof, and recorded a notice of said location in the records of said Kern County, and entered into possession and occupation of said land and every part thereof under said claim. That these defendants are informed and be-

lieve and therefore allege that said several locators and each of them made said location for their and each of their own use and benefit, and for the use and benefit of no other person whatever, and with the purpose of acquiring title to said land and to the gas, oil and other minerals therein contained, under the mining laws of the [46] United States; and that said location notice was duly recorded, on or about January 25, 1909, in the Records of said Kern County.

Allege that on long prior to September 27, 1909, said locators had executed to defendant McLeod their quitclaim deed for the said northwest quarter, and that in consideration thereof defendant McLeod had promised and agreed with said locators: that he would diligently prosecute drilling operations on said northwest quarter; that in the event oil was discovered on said northwest quarter in said operations, defendant McLeod would thereupon apply to the United States for letters patent to said quarter section, and would proceed to obtain patent therefor; and that when the receiver's final certificate was issued in said patent proceeding, defendant McLeod would reconvey to said locators the north one hundred acres of said quarter section.

Allege that thereupon defendant McLeod erected a standard drilling rig and other equipment upon said northwest quarter, for which said McLeod paid more than One Thousand Dollars.

Allege that long prior to September 27, 1909, defendant McLeod leased the south sixty acres of said

northwest quarter to defendant California Midway Oil Company.

Allege that long prior to September 27, 1909, defendant J. M. McLeod assigned to defendant 32 Oil Company all his rights in and to the said Lease to said California Midway Oil Company and that the consideration therefor was a large number of shares of the capital stock of defendant 32 Oil Company issued by it to defendant McLeod and other good and valuable consideration.

Allege that on or about August, 1910, defendants 32 Oil Company, J. M. McLeod ~~Company~~, and the said locators, [47] executed to defendant Associated Oil Company their quitclaim deed for the north one hundred acres of said northwest quarter.

Allege that from long prior to September 27, 1909, until the time of said conveyance to said Associated Oil Company, to wit, about August, 1910, said defendants J. M. McLeod, 32 Oil Company and California Midway Oil Company, were in open, notorious and continuous possession and occupation of all of said northwest quarter. That at all times thereafter defendants J. M. McLeod, 32 Oil Company and California Midway Oil Company have been in said possession and occupation of the South Sixty acres of said northwest quarter, and defendant Associated Oil Company of the north one hundred acres thereof.

III.

Allege that prior to May, 1909, defendant California Midway Oil Company commenced drilling a well for oil upon said northwest quarter. That said

California Midway Oil Company diligently and continuously prosecuted said drilling until May or June, 1909, and that in May or June, 1909, defendant California Midway Oil Company discovered and developed in said well oil in commercially paying quantities. That ever since said discovery defendant California Midway Oil Company has operated said well and has produced and obtained oil therefrom.

Allege that defendant Associated Oil Company, upon obtaining said north one hundred acres as aforesaid, took possession thereof, and thereafter diligently and continuously prosecuted drilling operations thereon until it had developed thereon oil in paying quantities, and that defendant Associated Oil Company has always since their completion, operated wells drilled by it on said land and has produced oil therefrom.

Allege that in such work of drilling, defendants California Midway Oil Company and Associated Oil Company expended [48] respectively, many thousands of dollars.

IV.

Allege that it was stipulated and agreed by said locators and defendant McLeod, and likewise by defendants California Midway Oil Company and Associated Oil Company as they acquired their said interests in said northwest quarter, that said northwest quarter should be developed and worked as one mining claim, and that any work done and any improvements or discovery made upon said northwest quarter by any of said persons or corporations,

should be done and made for the benefit and advantage of all of said northwest quarter ~~of the Northeast Quarter~~ of section 32 also.

V.

Allege that for and on behalf of said "Montana Mining Claim" these defendants have performed or caused to be performed ~~for and~~ on ~~behalf of~~ said northwest quarter more than one hundred dollars worth of labor during each and every year since January 1, 1909, and have caused to be expended during each such year more than one hundred dollars for improvements on said claim, which labor and improvements were all done and made for the purpose of discovering, developing and producing oil upon said claim.

VI.

Allege that these defendants and their said co-defendants herein acquired their respective rights and interests in said northwest quarter of section 32 as aforesaid, and made all of their said respective expenditures for and on account of said northwest quarter, and placed and made their said respective improvements and did their said work of development and operation upon said land, in good faith, without any knowledge of suspicion whatsoever of any actual, claimed or asserted infirmity, defect or invalidity, or of any, actual, claimed [49] or asserted lack of *bona fides* or necessary qualifications upon the part of said locators or any of them, in making said locations or any of them, and all in reliance upon the validity and *bona fides* of said locations and each of them.

That the said possession and interest of these defendants, and the respective interests and possession of their codefendants herein, in said northwest quarter, and their respective operations thereon, were at all times with the full knowledge of said plaintiff by and through examinations of said northwest quarter and of the things being done thereon made at various times by the agents of the Department of the Interior of the plaintiff and reports thereof by said agents to said Department; that notwithstanding such knowledge this plaintiff made no objection whatever at any time prior to the filing of the bill of complaint herein to the claim of title by said McLeod or of the claim to said northwest quarter by these answering defendants or of the respective claims thereto by those claiming as aforesaid by, through and under these answering defendants, or either of them, or to the possession, occupation and working of said northwest quarter by said persons and corporations as aforesaid, until the filing of said bill of complaint. And that on account of the belief and reliance on the part of these answering defendants and said Associated Oil Company and said California Midway Oil Company, and each of them, in the validity of said locations as aforesaid, and because of the great expenditures made by said McLeod and said defendants as aforesaid, and on account of the plaintiff's said knowledge thereof and failure as aforesaid to make objection thereto, these defendants allege and assert that this plaintiff is now estopped from claiming that it is entitled to the possession of said land described

in said amended bill of complaint or of the oil, gas or minerals therein, and that [50] the plaintiff is guilty of laches in the institution of this suit and in objection to the rights and title of these defendants and of any defendant herein claiming by, through or under these defendants or either of them, and that this plaintiff ought not now in all equity and good conscience to be heard to assert any claim or right to dispossess these defendants or any of them, or of the other defendants herein claiming an interest in said land, or to assert any claim of right or title to or on account of any part of the oil, gas or minerals therein or heretofore extracted therefrom. [51]

THIRD DEFENCE.

As and for their third defence herein, defendants, J. M. McLeod and 32 Oil Company admit, deny and allege:

I.

Repeat their said second defence and make the same a part hereof the same as though again fully set forth herein.

II.

Allege that on and long prior to January 1, 1909, the plaintiff, as the proprietor of the mineral lands on the public domain of the United States,—including placer mining lands and oil-bearing lands, among others,—had permitted and acquiesced in the entering upon said lands for the purpose of exploring the same and making discovery, and the taking and removing of the mineral contained in said lands, and this had continued for so many years

that it became recognized as fully acquiesced in, so that miners could proceed, as of right, in reliance upon this custom.

III.

Allege that the Congress of the United States, acting for and upon and concerning its said proprietory rights, had long prior to January 1, 1909, enacted the following as Section 2319 of the Revised Statutes of the United States:

> "All available mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found, to occupation and purchase by citizens of the United States,— . . . under regulations prescribed by law and according to the local customs or rules of miners in the several mining Districts.

And said provision was duly approved and has ever since been in full force.

Allege that in 1897 it was provided, by an Act of that year, duly passed by said Congress, and approved by the President [52] of the United States, that

> "Any person authorized to enter lands under the mining laws of the United States, may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefore, under the provisions of the laws relating to placer mining claims."

Allege that provision had been made by law and regulations prescribed under which, before patent

should be granted, a discovery was required to be made upon the claim for which patent was sought, and it was recognized by Congress and by the courts of the several States, including California, that a person prospecting and exploring for oil who had duly initiated his rights as to mining a claim, had the right to continue his operations without interference, until he had made discovery or abandoned the attempt.

IV.

Allege that provision had been made by law prior to January 1, 1909, whereby eight persons might join together and locate 160 acres of oil land, and perfect the right to patent by making one discovery for the entire tract.

That in the making of such discovery and the exploration leading thereto, it was well known to the plaintiff at all times that a period of from eight months to two years was usually required, and that the operator must expend large sums of money in preparing to drill for oil, and very large sums of money in prosecuting such drilling to discovery; and that this was especially true where the work was carried on in a desert remote from the source of supplied, and where water was hard to procure and living conditions made it difficult to obtain labor, as was the fact regarding said northwest quarter.

V.

Allege that under these circumstances and said state of the law with regard to oil lands upon the public domain, all [53] of which existed on January 1, 1909, and thereafter until discovery was made

on said claim (which statutes and regulations were not governmental but were the authorized method by which the plaintiff as the proprietor of lands possibly containing oil or gas proposed and offered to sell the same) the locators hereinbefore referred to, on January 1, 1909, for the purpose and with the intent of accepting the offer so made by the plaintiff as a proprietor of the land described in said amended bill of complaint made and posted their notice of location of the placer mining claim named in said amended bill of complaint, and caused the same to be recorded, and thereafter, in reliance upon and in acceptance of the offer of the plaintiff, that said land was and should be open to occupation and exploration and purchase, and that, for the purpose of making discovery, they, having initiated their said right might proceed to explore upon said land, in accordance with the regulations prescribed by law, and according to the local customs and rules of miners in said District, —the said locators arranged to develop the north half of said section 32 in a group form, and conveyed their interest to said McLeod, and obligated him to proceed with the development of and upon said north half of said section 32. That in accordance with their initiated rights, and in further acceptance of the offer of the plaintiff acting as a proprietor of said land, these answering defendants expended large sums of money prior to September 27, 1909, in the erection of a drilling rig and other equipment upon the land described in said amended bill of complaint, and in other work thereon and also elsewhere, but for

the benefit of said last-mentioned land and leading to the discovery of oil thereon.

Allege that prior to, and after September 27, 1909, these defendants, in reliance upon the contract arising because of the proposal and offer of the plaintiff as the [54] proprietor of said lands, that said locators or persons acting in their right, might explore and drill for oil thereon until discovery should be made, or the effort to make discovery should be abandoned, and upon such discovery should have the right to purchase said lands under the regulations prescribed by law, and relying upon the fact that said proposal had been accepted, and money had been expended in substantial sums in the performance of the conditions prescribed by the plaintiff, and that all of said conditions had been met and performed, so as to entitle said locators and these defendants in their right and as their grantee, to go forward and make available the said expenditures by discovering oil and gas upon said property and perfecting its rights, to patent,—these defendants proceeded, as hereinbefore alleged, and performed each and all the conditions on their part to be kept and performed, until oil was discovered upon the land described in said amended bill complaint.

VI.

Allege that neither of these answering defendants nor any person or corporation claiming by, through or under them, or either of them, ever intended to or did in any wise abandon the right to go forward to discovery upon said claim, but said work was at all times diligently prosecuted, and in the manner

and with the degree of diligence recognized by the local customs of miners in said District, and known, approved and acquiesced in by the plaintiff.

That, because of said offer made by the plaintiff as the proprietor of said lands, and accepted and acted upon as hereinbefore alleged, these defendants acquired and had full right to go forward and perfect these defendant's equitable title to said property by making discovery of oil and gas thereon, and these defendants did, in fact, acting by and [55] through said California Midway Oil Company and Associated Oil Company, cause said discovery to be made, and said equitable title thereby to be perfected. [56]

FOURTH DEFENCE.

As and for their fourth defence herein defendants J. M. McLeod and 32 Oil Company admit, deny and allege:

I.

Repeat their third defence and make the same a part hereof the same as though again fully set out herein.

II.

Allege that for more than five years prior to the commencement of this suit these defendants, and their privies in interest, and those claiming an interest in said northwest quarter by, through and under these answering defendants, or either of them, have been in the lawful, peaceable, and continuous possession of the land first described in said amended bill of complaint, and continuously working and developing the same as a mining claim, without objec-

tion, let or hindrance from plaintiff or anyone else: that during all of said five years period plaintiff has been fully informed and has known of said occupation and working of said land by said defendants; and that the aforesaid work thereon has been openly, notoriously and continuously carried on, under claim of exclusive right thereto, with the full knowledge of plaintiff, and without any objection or protest whatever. [57]

FIFTH DEFENCE.

As and for their fifth defence herein, defendants J. M. McLeod and 32 Oil Company, respectfully reassert their claim heretofore made by Motion, and say that this court has no jurisdiction to hear or try this case on the equity side of the court, and allege that at the beginning of this action plaintiff was out of possession of the land described in said bill of complaint; that these defendants and those claiming by, through and under them as hereinbefore alleged in this answer, had been in open and notorious possession thereof, under claim of right, since long prior to September 27, 1909, under claim of claim of right; and that plaintiff has a full, speedy and adequate remedy at law, and these defendants are entitled to have this case sent and transferred to the law side of this court and to a trial by jury.

WHEREFORE, these defendants pray:

1. That this case be transferred from the equity side to the law side of this court, to be tried by a jury.

2. That the bill of complaint herein be dismissed;

3. That the Court find and decree that the plaintiff is and should be estopped to assert any right in

the land described in said bill of complaint as against these defendants;

4. For their costs herein expended;

5. And for such other and further relief as equity and good conscience shall require.

ROBERT M. PEASE,

Solicitor for J. M. McLeod and 32 Oil Company.

[58]

[Endorsed]: Orig. No. B–10–In Eq. In the District Court of the United States, in and for the Southern District of California, Southern Division. United States of America, Complainant, vs. California Midway Oil Company, et al., Defendants. Answers of Defendants J. M. McLeod and 32 Oil Company. Filed Jun. 20, 1917. Wm. M. Van Dyke, Clerk. By T. F. Green, Deputy Clerk. Received copy of the within answer this 20th day of June, 1917. Albert Schoonover, Attorney for Complainant. Robert M. Pease, Attorney at Law, 519 Story Building, Los Angeles, California, A–1508 Bdwy. 2761, Attorney for Dfts. J. M. McLeod and 32 Oil Company. [59]

In the District Court of the United States for the Southern District of California, Northern Division, Ninth Circuit.

IN EQUITY—No. B–10.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CALIFORNIA MIDWAY OIL COMPANY, ASSOCIATED OIL COMPANY, COLUMBUS MIDWAY OIL COMPANY, 32 OIL COMPANY, L. B. McMURTRY, J. M. McLEOD, and STANDARD OIL COMPANY,

Defendants.

**Answer of Defendant L. B. McMurtry.**

L. B. McMurtry does hereby make and file his answer to the amended bill of complaint on file in the above-entitled suit.

FIRST DEFENSE.

As and for his first defense to the cause of action set forth in said bill of complaint said defendant moves the court for an order transferring the above-entitled suit to the law side of the above-entitled court for trial and final disposition. Said motion is based upon the following grounds;

(a) Said bill of complaint affirmatively discloses that said suit is one in ejectment brought by the plaintiff out of possession to recover the possession of the lands described in the complaint and one for

damages for alleged past trespass upon said land described in the complaint, over both of which said subjects of litigation defendant alleges this court of [60] equity has no jurisdiction and for which plaintiff has a full, plain, speedy, complete and adequate remedy at law.

(b) That the facts set forth in the said bill of complaint fail to show any ground of equitable relief or any right to equitable relief.

Said motion is made and based and will be made and based upon the records and files in the above-entitled suit.

SECOND DEFENSE.

Defendant for a second and separate defense to the bill of complaint on file in the above-entitled and numbered suit alleges that the said bill of complaint does not state facts sufficient to constitute a cause of action or suit against this defendant and does not state facts sufficient to entitle the plaintiff to any relief as against this defendant and alleges further that the above-entitled court, sitting as a court of equity, has no jurisdiction of the subject matter of said suit because the allegations of the bill of complaint show that the main case made thereby and the chief object and purpose of the suit is to try the right to the possession of the land described in the complaint as between the plaintiff out of possession and defendant in possession of the land described in the complaint and for a judgment for damages for alleged past trespasses, for all of which alleged rights defendant alleges plaintiff has a full, plain, speedy, adequate and complete remedy at law and that a suit to en-

force or try said rights and claims of the plaintiff is without the jurisdiction of a court of equity

THIRD DEFENSE.

Defendant further answering said complaint alleges that this defendant is joined with a number of other defendants in this cause for several distinct and independent matters which [61] have no relation to each other and in which, or the greater part of which, this defendant is in nowise interested or concerned and ought not to be implicated or impleaded and alleges that this defendant is joined in a purported cause of action for an accounting and damages against certain of the defendants for purchasing and receiving oil from other of the defendants and is joined with other defendants in an action for trespass upon the premises described in the complaint, together with an action for damages for the conversion of oil and gas extracted by them or purchased by them or sold by them from said premises or a part thereof.

FOURTH DEFENSE.

And for his fourth defense to the said bill of complaint on file in the above-entitled and numbered suit this defendant admits, avers and denies as follows:

I.

Denies that for a long time prior to or on the 27th day of September, 1909, or at all times or at any time since said date the plaintiff has been or that it now is the owner of the land described in the bill of complaint or any part thereof; save and except defendant admits that on said September 27th, 1909, and at all times since said date the plaintiff has been

and now is the holder of the naked legal title to said land and as to that portion of the said quarter section described as follows, to wit:

Commencing at the northwest corner of the northwest quarter (NW. ¼) of section thirty-two (32), and running thence at a right angle southerly sixteen hundred and fifty (1650) feet; thence at a right angle easterly ten hundred and fifty-six (1056) feet; thence at a right angle northerly sixteen hundred and fifty (1650) feet to the northerly line of section thirty-two [62] (32); thence at a right angle westerly along said northerly line of section thirty-two (32) ten hundred and fifty-six (1056) feet, containing approximately forty (40) acres of land, more or less, all in township 31 south, range 23 east, M. D. B., and M., county of Kern, State of California, hereinafter in this answer called "defendant's forty (40) acres," and was and is the holder of said naked legal title only as trustee for the use and benefit of this defendent and his predecessors in interest, and that said defendant at the time of the commencement of this suit, for long prior thereto and ever since has been and now is the owner of the full equitable title to the said "defendant's forty (40) acres" of the said land described in the complaint herein under the circumstances, because and by reason of the facts hereinafter in this answer fully set forth. Denies that the said plaintiff either on the 27th day of September, 1909, or for a long time prior thereto or at all times or at any time since said date was the owner of or entitled to the possession of the oil, petroleum or gas or all or any other minerals contained in said

land described in the complaint or any part thereof, but, on the contrary, alleges that on said 27th day of September, 1909, for long prior thereto and ever since said date the defendants herein by and through themselves and by and through their predecessors in interest have been and still are in the actual *bona fide* possession and occupancy of the land described in the complaint and were on the said 27th day of September, 1909, and ever since said date, and at the time of the commencement of this suit, and for a long time prior thereto have been in the actual possession of said land and rightfully entitled to hold the possession thereof and to mine, extract and dispose of the minerals, oil and gas therein contained for their own use and benefit by virtue of the compliance by the defendants referred to and their predecessors in interest with [63] the laws of the United States relative to the sale and disposition of its mineral lands and by virtue of the Act of Congress of June 25, 1910, entitled: "An Act to authorize the President of the United States to Make Withdrawal of Public Lands in Certains Cases," and by reason of the further facts and circumstances hereinafter set forth. That at the time of the commencement of this suit and ever since the month of November, 1912, this answering defendant was in the actual, full and complete possession and occupancy of the said "defendant's forty (40) acres" of the said quarter section of land described in paragraph II of the complaint herein and ever since has been in the actual and continual possession of said land up to and including the date of the commence-

ment of this suit and on September 27, 1909, and prior to said date and at all times since said date the said defendants, and their predecessors in interest ever have been and at the time of the commencement of this suit were and still are actual *bona fide* occupants and claimants of the said land described in said complaint and the oil, gas, petroleum and mineral therein contained, and that on and before the said September 27, 1909, the said defendants and their predecessors in interest were in the diligent prosecution of work leading to the discovery of oil and gas upon said land and continued in such diligent prosecution of said work leading to the discovery of oil and gas upon said land.

II.

Denies that on the 27th day of September, 1909, the President of the United States, either acting by and through or by or through the Secretary of the Interior or under authority legally invested in him so to do or otherwise duly or regularly or at all withdrew or reserved all or any of the land described in the bill of complaint from mineral exploration or from all or any form of location or settlement or selection or filing or [64] entry or patent or occupation or disposal under the mineral land laws of the United States or at all. Denies that on or since the 27th day of September, 1909, that none of said lands has been subject to exploration for mineral oil or oil or petroleum or gas or to the occupation or to the initiation of any right under the public land or other laws of the United States, but defendant avers that on and for long prior to and

ever since said last named date all of the lands described in the complaint has been subject to such exploration, occupation and initiation of mineral rights and rights therein and thereto under any by virtue of the laws of the United States.

Defendant alleges that as to the lands described in paragraph II of the bill of complaint herein the defendants herein and their predecessors in interest and their successors were at the time of filing of said bill of complaint and for long prior thereto authorized by the provisions of said Act of Congress approved June 25, 1910, hereinbefore in this answer referred to, to continue in the occupation of the said land and its exploration and development for petroleum or gas or any other minerals therein contained for the reason that by the terms of said act of Congress the force and effect of the order of withdrawal of September 27, 1909, as to the said land described in said complaint was, as this defendant is advised by counsel learned in the law and therefore states the fact to be, vacated and made null and void.

Defendant alleges that on September 27, 1909, the said land described in the complaint contained and bore oil and gas and that the defendant and his predecessors in interest on said 27th day of September, 1909, and long prior thereto were in the *bona fide* occupation of and the actual claimants in the possession of the said lands as oil and gas lands. That the defendant and his predecessors in interest and their successors remained in [65] the actual and *bona fide* possession as claimants of said land ever since the said 27th day of September, 1909, and prior

thereto and that the said defendant and his predecessors in interest and their successors in the possession of said lands as aforesaid and as claimants thereof on said 27th day of September, 1909, were in the diligent prosecution of said work and did continue the same until discoveries of oil or gas upon said property.

III.

Denies that notwithstanding the premises or otherwise or in violation of the proprietary or other or any right or rights of the plaintiff or in violation of the laws of the United States or of lawful or any orders or order or proclamation or proclamations of the President of the United States or particularly or at all in violation of the said alleged or any other order of withdrawal of the 27th day of September, 1909, or any order of withdrawal or in disregard of or contrary to or by infringement on the governmental or any other policy adopted by the United States for the protection or conservation or disposal or use of the petroleum or gas contained in the said land described in the said bill of complaint or in other lands or land belonging to the United States the said defendants, or any of them, entered upon or took possession of the land in the bill of complaint particularly described or any part thereof long or at all subsequent to the 27th day of September, 1909, or not prior thereto for the purpose of prospecting or exploring or drilling oil wells or well for or discovering or extracting or producing or converting or appropriating to their own use or to the use of any of them petroleum or oil or gas

therefrom or at all subsequent to said September 27, 1909.

Denies that said defendants entered upon or took possession of the land described in the bill of complaint or any thereof [66] long or at all subsequent to the said 27th day of September, 1909, or not prior thereto either for the purpose of prospecting or exploring or drilling wells or well for or discovering or extracting or producing or converting to their own use or to the use of any of them petroleum or oil or gas therefrom, and in this behalf this defendant alleges that said defendants' predecessors in interest entered upon the lands described in said bill of complaint and took possession thereof long prior to September 27th, 1909, and alleges that on said 27th day of September, 1909, defendants' predecessors in interest were *bona fide* occupants and claimants of the said lands described in paragraph II of said bill of complaint and of the whole thereof, and alleges that he is informed and believes, and therefore states on such information and belief the fact to be that defendants' predecessors in interest to the said land were on said September 27th, 1909, in the actual possession of the said land described in said complaint and in the diligent prosecution of work leading to the discovery of oil or gas upon said land, and from said date until the acquisition by this defendant of his interest in said land in the diligent prosecution of such work leading to such discovery and thereafter the said work leading to discovery of oil and gas upon said land was continued and the said work

was diligently prosecuted by this defendant's predecessors in interest and their successors herein until the discovery in said land of petroleum or gas.

IV.

Answering paragraph V of said complaint, defendant admits that none of said defendants or any person or corporation under whom or through whom this defendant claims a right or interest to the land described in the said bill of complaint had discovered petroleum oil or gas or other minerals on or in said land prior to September 27th, 1909, but defendant denies that [67] the said land described in said complaint or any thereof was withdrawn by said or any alleged order of withdrawal on said September 27th, 1909, or at any other date or at all withdrawn and denies that none of said defendants or any person or corporation under whom or through whom they or any of them claim a right or interest in said land described in said bill of complaint mentioned had discovered petroleum or gas or other minerals or mineral on or in said land before said land was withdrawn by any order of withdrawal, and in this behalf this defendant alleges that prior to said 27th day of September, 1909, said defendants and their predecessors in interest and their successors became and ever since have been *bona fide* occupants or claimants of said land under valid location and claim made within the meaning and purport and effect of the laws of the United States and of the proviso in the said order of withdrawal of September 27th, 1909.

V.

Answering paragraph VI of said bill of complaint defendant denies that none of the defendants was on the 27th day of September, 1909, a *bona fide* occupant or claimant of said land or in the diligent prosecution of work leading to the discovery of oil or gas thereon or therein.

VI.

Defendant admits that the other defendants herein have drilled oil and gas wells upon the land described in the bill of complaint, which wells were drilled for the production of oil and gas found upon said land, but this defendant denies that the defendants or any of them long after the 27th day of September, 1909, or at any other time drilled oil or gas wells on said land in violation of the proprietary or any rights or right of the plaintiff herein or in violation of the laws of the United States or any thereof or of the proclamation or [68] proclamations or order or orders issued by the President of the United States or particularly or otherwise in violation of the order of withdrawal of September 27th, 1909, or any other date, or in disregard of or contrary to or by infringement upon the general or any governmental or other policy adopted or declared by the United States either for the protection or conservation or use or disposal of petroleum oil or gas in the land described in the complaint or other land or lands belonging to the United States or to the great or irreparable or any damage to the plaintiff or to the great or irreparable or any injury of the lands described in said bill of complaint

or to the great or irreparable or any injury of said land described in said bill of complaint or any thereof or to the great or irreparable or other injury or any injury to other land belonging to the United States. Denies that the defendants have extracted or produced or converted or appropriated to their own use or to the use of any of them from any lands adjacent to the land described in the complaint or any other land belonging to the United States large or any quantities of petroleum oil or oil or gas or that the defendants or any of them are now continuing so to do or that the defendants are or any of them is threatening to or will hereafter continue to do so either to the great or any irreparable or any injury to the said adjacent or other lands of the United States or to the great or any irremediable or any damage to the plaintiff. This defendant denies that he has and will continue to produce and dispose of oil and gas from "defendant's forty (40) acres" of the land described in the complaint herein, or any part thereof in violation of any proprietary rights of the plaintiff or any proclamation or order of the President of the United States or the order of withdrawal of September 27th, 1909, or any policy adopted or declared by the United States or from any land belonging to the [69] United States or to the great or irreparable or any injury to any land of the plaintiff or to the great or irreparable or irremediable or to the great or irreparable or irremediable or any damage to the plaintiff.

VII.

Answering paragraph VIII of the bill of complaint, denies that the defendants have or any of them has drilled or maintained or operated oil or gas wells on said land described in the complaint or any thereof or have or has extracted or produced petroleum oil or oil or gas from such wells in an unskilled or negligent or careless or unworkmanlike manner or so as to cause the inflow of large or unnecessary quantities or quantity of water into such wells or well or into the oil sands or sand or oil reservoirs or oil reservoir in which the petroleum oil or oil or gas are or is contained in such land or any thereof, or in such a manner or to such an extent or in such quantities as to cause water to infiltrate or to saturate or to impregnate such oil sands or sand or reservoirs or reservoir or the petroleum oil or oil or gas therein either to the great or irremediable or any damage of the plaintiff or to the great or irreparable or any injury of said land or to the petroleum or gas deposit therein or any thereof or at all in an unskilled or negligent or careless or unworkmanlike manner. On the contrary, defendant alleges that all wells drilled upon said land were drilled, maintained and operated and all oil and gas obtained and extracted and produced therefrom have been extracted and produced therefrom in a good, workmanlike manner and according to well known and approved methods.

Denies that the defendants are, or any of them is, now continuing to drill, maintain or operate gas or oil wells on or extract or produce petroleum

oil or gas from wells upon said land described in the complaint or any part thereof in an [70] unskilled, negligent or careless or unworkmanlike manner or to perform the acts or any of them complained of in paragraph VIII of the complaint herein or will continue so to do, or have or any of them has threatened or are or any of them is threatening so to do said or any of said acts to the further or any great or irreparable or any damage to the plaintiff or to the further or other great or irreparable or any injury to the land or any thereof, or to the complete or any extermination or destruction of the petroleum oil or oil or gas or any thereof deposited therein.

VIII.

Answering paragraph IX of said bill of complaint defendant denies that the petroleum oil and gas extracted and produced from said land or any thereof have or has been wasted by the defendants or either of them. Denies that this defendant sold and delivered to other persons and corporations oil and petroleum taken by the said defendant from the "defendant's forty (40) acres" of the land described in the complaint, or any part thereof, and denies that he has himself used oil and gas produced by him lawfully or at all from the said land.

IX.

Answering paragraph X of said bill of complaint this defendant admits that he claims some right, title and interest in the "defendant's forty (40) acres" of the land described in the bill of complaint

and in the petroleum oil and gas therein, and admits that each of the claims of said defendants herein to the said land and all the land described in the complaint is predicated upon and claimed directly and mediately through the mining location mentioned in the complaint; but denies that said mining location is a pretended mining location. Admits that said location was made on the 1st day of January, 1909, [71] in the names of the persons mentioned in said paragraph X of said complaint, other than this defendant, but denies that the said location was a pretense or was falsely pretended to have been made on the land described in the complaint. Denies that it was made by a pretended association of eight persons. Denies that the notice was a pretended notice or was a pretended notice of a pretended location. Denies that the said notice of location was unauthorized. Denies that the same was fraudulent; denies that the same was placed upon the mining records of the county in which the land is located on the 5th day of January, 1909, or at any other time through the unauthorized or fraudulent procurement of this defendant or any other person. But, on the contrary, defendant alleges that the said location was made by said defendant for and on behalf of the other persons named in paragraph X of the bill of complaint and for the benefit and use of the said persons and without fraud and without any intent to deceive or defraud any person, firm or corporation or the Government of the United States, and alleges that

the said locations were made by the said locators in absolute good faith.

Denies that none of said defendants has acquired or could acquire or cannot now rightfully or lawfully assert any right, title or interest in or to the land described in the complaint or in or to the petroleum oil or oil or gas therein or in or to any of the petroleum oil or gas heretofore extracted or now being extracted or which shall hereafter be extracted or produced therefrom under or by reason of said location referred to in paragraph X of said complaint or under the notice thereof; denies that the said locations mentioned in said paragraph X of said bill of complaint or the notice thereof were or either of them was a pretended location or a pretended notice of location or were or either of them was unlawful or fraudulent or invalid or that they have or either of them has no effect either [72] in law or in equity; denies that the said location mentioned in said paragraph X of said bill of complaint was not made or that the notice thereof was not caused to be recorded by said locators of said claim or by any of them acting in their own proper persons or through or by any person duly authorized so to do by them or that said location was not made or that said notice of location was not recorded in the interest of or for the benefit or use of said locators of said claim or any of them either individually or as an association or that said location was in, through or in fact made or that said notice of location was in through or in fact caused to be spread upon the said mining records

by this defendant unlawfully or fraudulently or secretly or without the knowledge or consent or direction or sanction or subsequent ratification of said locators of said claim or any of them, or for the exclusive or any use or benefit or in the sole or any interest of this defendant or some other person or persons than said persons who located said claim or with or for the sole or only or any purpose or intent by such or any device or fraud or concealment or at all to secure to this defendant or his assigns or assign or to some other person or persons than such locators unlawfully or in violation of or in fraud of the rights of the plaintiff or in violation of section 2331 of the Revised Statutes of the United States or of other or any law or laws of the United States, or otherwise, a greater or any area of mineral land than it was lawful at the date of such location or at the present time to be embraced in a single location by this defendant or by any one individual person or corporation or by an association of persons composed of a less number than eight persons severally qualified to make a mining location.

Defendant alleges that the persons named in paragraph X of [73] the bill of complaint herein as locators of the placer mining claim mentioned in said paragraph covering the land described in the bill of complaint herein were each and all of them citizens of the United States on January 1st, 1909, over the age of twenty-one years, and that each and all of them were on said date acting together in good faith for the purpose of locating said land

and acquiring title thereto under and in pursuance of the laws of the United States relating to the sale and disposal of mineral lands commonly known as placer claims, and that on said date said persons named in said paragraph, in compliance with said laws duly located said land and then and there each and all of them became vested with the title to an undivided one-eighth interest in and to said land, and that thereafter this defendant herein became vested by mesne conveyance with the title of said locators and each and all of them in and to the "defendant's forty (40) acres" of the land described in the complaint and ever since said time has been and now is the owner thereof. Defendant, however, claims no right, title or interest in or to any part of the land described in the complaint save and except the "defendant's forty (40) acres" thereof. Defendant further alleges that each of said locators on January 1st, 1909, and ever afterward was a *bona fide* locator of said land.

*XI.*

Denies that either because of the premises in the bill of complaint or otherwise or at all or for any reason none of the defendants has ever had or now has any right or title or [74] interest in or to or any lien upon said land or any part thereof or any right or title or interest in or to the petroleum or mineral oil or gas deposited therein or any right to extract petroleum or gas or other mineral from said land or to convert or dispose of petroleum oil or oil or gas so extracted or any part thereof. Denies that, on the contrary, or otherwise, the acts or the

act of those defendants who have or any of them who has entered upon said land or drilled oil or gas wells thereon or used or appropriated the petroleum oil or oil or gas deposited therein or assumed to sell or convey any interest in or to any part of said land or any part of the petroleum or gas extracted therefrom were or was all or any of them in violation of the laws of the United States or of the order of withdrawal mentioned in the complaint, or that all or any of said alleged acts are or is in violation of the rights or any right of the plaintiff herein or the said alleged acts or any of them interfered with the execution by the plaintiff of its public or any policies or policy with respect to said land or petroleum oil or gas or oil therein either as set forth in the bill of complaint of otherwise or at all. But, on the contrary, defendant alleges that the entry of his predecessors in interest upon said land and their and his entry thereupon and the development of said land for mineral was directly pursuant to and because of the invitation and encouragement so to do by the plaintiff and by virtue of the long established and continued policy of liberality by the Government, the plaintiff, towards miners and others desiring to develop mineral lands of the plaintiff [75] and acquire title thereto, which said policy, invitation and encouragement defendant alleges has existed continuously for more than forty years. That at and for a long time prior to the time of the promulgation of the withdrawal order of September 27th, 1909, it was universally under-

stood and it was the custom and rule of miners in California and elsewhere on the Pacific Coast that a valid petroleum and oil placer claim was obtained by entering upon and taking possession of land claimed to be petroleum land and causing notice of location to be filed with the recorder of the county in which the land was situated and by commencing actual work for the development of said land and claim at any time within one year after making, posting and filing of the notice of location and performing annual assessment work to the extent of $100.00 per year thereafter until discovery, all of which customs were well known throughout the Pacific Coast and in the United States of America, and had been invoked continuously for a period of more than forty years prior to the date of said order of withdrawal, which facts and customs and rule was at all times well known to plaintiff and frequently acted upon and recognized by plaintiff. That on and prior to January 1st, 1909, and for more than twenty years prior thereto, and on said date and at all times since said date, it had been well established and was the law as to petroleum placer mining claims that when discovery of oil or gas should be made upon said claims that said discovery should relate back to the date of the initial act, to wit: the date of the actual making of the location. That the said policy was acquiesced in and adopted by the Government of the United States [76] and that many hundreds of patents have been issued prior to the date of the commencement of this suit over a period of more than forty

years based upon the custom and rules and law hereinbefore referred to; that at the time of the location mentioned in the complaint herein the policy, invitation and encouragement of the plaintiff above mentioned concerning its lands in California and the development thereof and the said custom and rule of miners and the said law above referred to as to discoveries and the disposition of the mining lands of the United States had become so well settled and known and had been continuously and repeatedly and without objection acted upon by both the plaintiff and its citizens for such a long period of time prior to September 27th, 1909, that on said date the said policy, invitation, encouragement, mining customs and laws had become a rule of property and were thereafter by Act of Congress approved June 25th, 1910, entitled "An Act to Authorize the President of the United States to Make Withdrawals of Public Lands in Certain Cases," expressly recognized and reiterated by the making of the President's order of temporary withdrawal dated September 27th, 1909, wholly inoperative as to the lands described in the bill of complaint in this suit.

FIFTH DEFENSE.

For further answer and defense herein this defendant without re-engrossing alleges all of the averments and makes all of the denials hereinbefore set forth, and also further alleges:

That at and before the commencement of this action defendant alleged and claimed and still alleges and claims that he was in and was entitled to

the possession of the "defendant's forty (40) acres" of the quarter section of land described in the complaint [77] herein and to no more thereof than the "defendant's forty (40) acres," which said fact at the time of the commencement of said action and for long prior thereto was well known to the plaintiff herein; that said defendant does not now have and never did have and never did assert any right, claim or interest in or to or possession of the other part of said quarter section or any part thereof.

That the defendants, J. M. McLeod, Standard Oil Company, Associated Oil Company, Columbus Midway Oil Company, Thirty-two Oil Company, California Midway Oil Company, have not nor has either or any of them any right, title or interest in or to or possession of the said "defendant's forty (40) acres" of said quarter section, and that said defendants other than the Columbus Midway Oil Company do not and never did, either subsequent to or before the commencement of this action, assert any right to the said "defendant's forty (40) acres" of the said quarter section or any part thereof or lay any claim thereto, of any kind, character or description, or to the possession thereof or any part thereof which said facts were well known to the said plaintiff herein at the time of the commencement of this action.

That this defendant has not and never did have any interest with the said other defendants named herein or any of them in any part of said land described in the complaint herein; that this defend-

ant was not interested with the said defendants above named or any of them in any gas heretofore extrated from said land described in the complaint or any thereof or which might hereafter be extracted from said land or in any oil or other mineral heretofore extracted from the said land or any thereof or to be extracted from the said land or any thereof, [78] all of which facts herein asserted were well known to the plaintiff at the time of and before the commencement of this suit.

SIXTH DEFENSE.

For a further and separate defense this defendant without re-engrossment alleges all of the averments and makes all denials hereinbefore set forth and alleges:

That on the 27th day of September, 1909, the President of the United States signed and promulgated as such President an order which, with the exception of the accompanying lists therein referred to, is in the words and figures as follows, to wit:

"TEMPORARY PETROLEUM WITHDRAWAL

No. 5.

"In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain, all public lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or nonmineral public land laws. All locations or claims existing and valid on this date may proceed to entry in the usual manner after field investigation and examination."

That in the lists accompanying said order of withdrawal the land described in paragraph II of the bill of complaint herein was included.

That there existed previous to and on the 1st day of January, 1909, and at all times subsequent to said date in the State of California and in the Midway Mining District, in which said mining district the said land is and always has been situate, miners' regulations and rules and customs governing [79] the location, manner of recording and amount of work necessary to hold possession of placer mining and all oil, gas and petroleum mining claims within said district.

That under said regulations such mining claims could be located within said district by distinctly marking the location on the ground so that the boundaries thereof could be readily traced and by posting a notice of location in a prominent position upon the ground located as such mining claim and by recording a duplicate of the said notice of location in the office of the recorder of the county in the State of California in which the land located upon was situate, to wit: Kern County, California, and by prosecuting upon said mining claim work leading and tending to the discovery of oil or gas on or in the ground described in the notice of location.

That the said Midway Mining District at all the times mentioned herein was in said Kern County.

That in the year 1909 and previous to the 27th day of September, 1909, the predecessors in interest of this defendant had located all of the land de-

scribed in the bill of complaint according to the provisions of the mineral land laws of the United States and the rules, regulations and customs of miners of the district in which said land was situate for and as a placer claim for the purpose of developing petroleum and other minerals thereon and therein and that the said land was then duly and legally located by the persons named as locators in the bill of complaint herein.

That the said location was made by marking on said land the boundaries of the quarter section described in the bill of complaint so that the same could be readily traced and a notice of said location was posted upon the ground and a copy of said [80] notice was immediately filed for record in the office of the recorder of the county of Kern, State of California.

That defendant is informed and believes, and therefore alleges the fact to be, that from on or about the 1st day of January, 1909, the said locators or someone in their interest or the successors of said locators and the predecessors in interest of this defendant in accordance with law and the regulations and in accordance with the then well known and existing local customs and rules of miners in said district began to and did diligently and continuously prosecute work on said mining claim leading and tending to a discovery of oil and gas upon the said mining claim, described in the complaint and said work leading to and tending to a discovery was continuously and diligently performed until the discovery of oil and gas on said claim.

This defendant alleges the fact to be that at the time of the signing and the promulgation of the said order by the President of the United States the predecessors in interest of this defendant did have and then owned an existing and valid location and claim to said land within the meaning of the said order of withdrawal.

Defendant avers that from the 1st day of January, 1909, defendant's predecessors in interest in said mining location herein mentioned and said defendant's predecessors in interest and their successors in interest in said mining location herein mentioned and said defendant have been in the continuous and actual occupancy of the said land described in the bill of complaint herein.

Defendant avers that by reason of the foregoing facts the said land described in paragraph II of said bill of complaint [81] at the date of the signing or promulgation of the said order of withdrawal and for a long time prior thereto and since said September 27th, 1909, has not been and was not "public land" within the meaning of said term as employed in the said order.

SEVENTH DEFENSE.

That for more than six years prior to the beginning of this action this defendant and his predecessors in interest have been in the lawful and peaceable possession of the "defendant's forty (40) acres" of the quarter section of land described in the complaint, and that the predecessors in interest of said defendant and their successors in interest have been in the lawful and peaceable possession

of the land described in the remaining half of said quarter section of said land, and that for more than six years last past the said land or some part thereof has been continuously worked by said defendants and their predecessors in interest as a mining claim without objection, let or hindrance on the part of the plaintiff or anyone else or any attempt being made or notice given to either or any of said defendants during said period of five years.

That for more than six years prior to the commencement of this suit the plaintiff has been fully informed and has fully known and has been fully advised of said occupation and working of the said land as aforesaid by the defendants and the predecessors in interest of the said defendants, and that at the time of the commencement of this suit and for more than six years prior thereto and prior to September 27th, 1909, there had been and the plaintiff at all times well knew that there had been an inception of development on said land. That by reason of the foregoing the plaintiff is and ought to be estopped from maintaining this action. [82]

EIGHTH DEFENSE.

And for a further answer and defense herein the defendant refers to and by such reference without re-engrossment alleges all of the allegations and makes all denials hereinbefore set forth and does hereby further allege:

I.

That on September 27th, 1909, and long prior to said date the defendant's predecessors in interest were in the actual possession and occupation of

the real property described in the bill of complaint and on said 27th day of September, 1909, there was and had been an inception of development work by defendant's predecessors in interest. That on said date defendant's predecessors in interest were in the actual occupation and possession of adjacent and adjoining land to the land described in the complaint and all of which land had been located for oil, gas or other mineral as placer mining claims and that the said defendant's predecessors in interest or their successors were operating said land described in the bill of complaint and the land adjacent and contiguous and adjoining thereto as one enterprise so far as development of said land was concerned on and long prior to the said 27th day of September, 1909. That the land described in the complaint and said other lands were then being held under locations as placer claims by the locators mentioned in the bill of complaint herein and other locators, all of whom were citizens of the United States and who duly located the said land pursuant to the laws of the United States, its rules and regulations, and the rules, regulations and customs of miners of the Midway Mining District in the county of Kern, State of California, in which District, County and State said lands were and are situate. [83]

That said predecessors in interest of this defendant never abandoned the said land or the mining locations thereon and thereof and that prior to the said 27th day of September, 1909, there had been duly filed in the office of the recorder of the county

of Kern, State of California, by the said locators mentioned in the bill of complaint herein notices of the location of said lands for and as placer mining claims as aforesaid and that ever since the making and filing of said locations and up to and including the 4th day of August, 1910, the predecessors in interest of this defendant under said mining locations and their successors have been in the actual and full and undisputed occupation of said lands under said mining claims and on the said 27th day of September, 1909, as this defendant is advised and believes, and therefore alleges the fact to be, were by themselves or their agents diligently and continuously operating the said land described in the complaint and other lands adjoining and adjacent to said lands to the end that discovery of oil or gas should be made upon the land described in the bill of complaint herein and that said operations continued without interruption until the "defendant's forty (40) acres" of said land described in the bill of complaint herein was conveyed to defendant herein and until the defendant herein was let into the possession of said land and until discovery of oil which was made on the mining claim described in the complaint herein.

That on said 27th day of September, 1909, and prior to said date and at all times intervening from said date up to the conveyance of said property to this defendant and up to the delivery of the possession of the said "defendant's forty (40) [84] acres" of said land described in the bill of complaint herein by defendant the Columbus Midway

Oil Company to this defendant the plaintiff herein was fully informed as to the said land and as to the said adjacent lands and as to all thereof and as to the possession thereof as herein alleged and as to the development thereof, and the said plaintiff at all times well knew that the said lands were occupied by said locators and in their behalf and well knew that work had been and was being done by the defendant's predecessors upon the said land described in the complaint herein and the other lands hereinbefore mentioned adjacent thereto by the defendant's predecessors and their successors, all of which work was leading to the discovery on the land described in the complaint herein of oil and gas; and said plaintiff well knew and was fully and completely informed and advised as to all other facts alleged in this entire answer.

Defendant alleges that he is informed and believes and therefore alleges the fact to be that the plaintiff herein caused the said land described in the bill of complaint herein and the said adjacent land above mentioned, alleged herein to have been operated as one enterprise by the predecessors in interest of this defendant and the successors of said predecessors in interest to be closely and repeatedly examined prior to September 27th, 1909, and thereafter during the years "1909" and "1910," and frequently thereafter until commencement of this suit.

Defendant alleges that at all times mentioned herein and at all times subsequent to the 27th day of September, 1909, and up to and until the commencement of this suit said plaintiff was fully aware

of all work being had and done upon the said land described in the complaint herein and upon other land [85] contiguous and adjacent thereto and of the claim of the said locators and their successors in interest as to the work being done upon said lands.

That at the time of the making of the locations of the said lands for and as placer mining claims and of all thereof, including the land described in the complaint herein, the said lands were arid and waste lands and did not equal in value the sum of $2.50 per acre.

That for more than six years prior to the bringing of this action plaintiff had full and complete notice and knowledge that the said land described in the complaint herein was in the possession of the defendant and the defendant's predecessors and their successors and that they were drilling thereon for the production of oil and gas therefrom and were in fact producing, selling and disposing of oil and gas from said land.

That the defendant's predecessors, the said locators and the successors of said locators from and including the year "1909" and at all times up to the commencement of this suit and for more than six years before the commencement of this suit were continuously expending large sums of money upon the said land described in the complaint herein and the development of the lands adjacent thereto and the said enterprise above mentioned for the production of oil and gas from each and all of said mining claims.

That upon the particular mining claim mentioned and described in the complaint herein there was expended many tens of thousands of dollars in the construction of wells, laying of pipe-lines, telephone and telegraph lines, tanks, wagon roads, buildings, tools and equipment, all of which was done openly and publicly by the said defendant's predecessors in [86] interest and with the full knowledge and the full continuous knowledge of the said plaintiff herein.

That never at any time prior to the commencement of this suit was any demand made upon the said locators of said mining claim or upon any person in the possession of the same or any part thereof or of any of said adjacent lands for the possession thereof by the plaintiff or any one in the plaintiff's interest, and never at any time prior to the commencement of this suit was any notice, written or verbal, given by the said plaintiff or any of its officers to this defendant or to the predecessors in interest of this defendant or to the said locators or to the successors to the interest of said locators to said lands or any thereof to cease operations upon said land or to remove therefrom any improcements, buildings, tools or equipment or to cease laying pipe-lines, telephone and telegraph lines or wagon roads across or through the said lands or any thereof; nor was any notice of any kind given to the said defendant or to the predecessors in interest or successors of said locators that they were expending said large sums of money upon said land at their peril or without recognition of

their rights or claim by the said plaintiff, nor was any notice ever given by said plaintiff to this defendant or to his predecessors in interest or successors of said locators or to any of them that the said claims of the said locators or of this defendant's predecessors in interest or the successors of defendant's predecessors in interest were not the holders of a location upon the said land or of a valid and existing claim or location upon said land at the time of the making of the withdrawal order in this answer hereinbefore referred to, nor was there any notice at any time subsequent [87] to said 27th day of September, 1909, or at any time prior thereto given to this defendant or the defendant's predecessors in interest to the effect that the plaintiff disputed the said rights of this defendant and his predecessors in interest in and to the said land nor was there ever any demand made upon said defendant or his predecessors in interest on or subsequent to September 27th, 1909, that they desist from proceeding with development work upon said land or any thereof herein mentioned or the land described in the complaint herein or any part thereof, nor was any demand made upon the said defendant or any of his predecessors in interest at any time prior to the commencement of this suit for the delivery to the plaintiff of any mineral product, oil or gas or any product taken from the said land or produced upon the said land, nor was any notice ever given to this defendant herein or his predecessors in interest not to market or dispose of any oil, petroleum or gas or other mineral produced

or extracted or taken from the said land, nor was any notice of any kind, character or description at any time given by the plaintiff prior to the commencement of this suit that the plaintiff claimed subsequent to September 27th, 1909, that the possession of this defendant and his predecessors in interest were in anywise contrary to law or that the said possession was not under a fully recognized location and valid and existing claim.

That the said plaintiff at all times knew ever since the 27th day of September, 1909, that the said defendant's predecessors and the successors of defendant's predecessors were expending large sums of money upon the said land and creating a value to the said land and to adjacent lands belonging to [88] the Government of the United States.

That the plaintiff and its officers well knew that this defendant and this defendant's predecessors in interest were relying upon the assent and acquiescence of the plaintiff in the occupation and improvement of the said land and the production from the said land and particularly the land described in the complaint herein of oil and gas.

That the plaintiff well knew at all times that the defendant's predecessors in interest and their successors in interest were expending large sums of money upon said land relying upon the acquiescence and assent hereinbefore set forth; that the plaintiff well knew that the defendant's predecessors in interest were maintaining and claiming and asserting that they were making said improvements and proceeding to the further development of the said

land and improvements thereon to the extent of many hundreds of thousands of dollars upon the understanding that defendant and his predecessors in interest had accepted an offer of the plaintiff herein to purchase the said land as proffered by the United States of America.

That for more than six years prior to the commencement of this suit and continuing from October, 1910, with the full knowledge and acquiescence of the plaintiff herein, this defendant's predecessors in interest and their successors did expend upon the land described in the complaint herein and for the improvement thereof and in work leading to the discovery of oil and gas thereon many tens of thousands of dollars and did pay for the purchase of the said land to the sellers thereof many tens of thousands of dollars, all of which was freely and openly spent without secrecy and with full knowledge to the general public and to the plaintiff. [89]

That all of said expenditures were made in good faith and in reliance upon the offer of the United States to dispose of and sell said lands, and fully believing in the representations made by the said locators hereinbefore set forth and fully believing and relying upon the fact that there was in fact an inception of development upon the land described in the bill of complaint herein and upon all of the lands described in the other actions hereinbefore referred to and that the predecessors in interest of this defendant at the time of the withdrawal hereinbefore mentioned were in the actual possession of said land and that up to the time of the delivery of possession to

the defendant by his predecessors in interest and that the said predecessors in interest were in the full and undisputed occupation of said land and all thereof and had commenced to and were diligently continuing work leading to the discovery of petroleum and gas upon the land described in the bill of complaint herein and other of said lands, and in fact believing that the said locators had a full and unquestioned and valid and existing claim to said land under the laws of the United States and that the same was fully recognized by the United States and its officers, and believing that the said plaintiff had fully acquiesced in the said claim as to development work, occupancy, right to occupancy of and the possession of said land and all thereof and had fully assented and acquiesced in the continuance of occupancy and possession of said land after the order of withdrawal of September 27th, 1909, and believing that the said plaintiff had recognized and was recognizing and had completely acquiesced in the claim of the defendant's predecessors in interest that they had an inception of development and that they had a valid and existing claim to the said land [90] at the time of and after said alleged withdrawal, and also that the said locations were valid and existing locations, and relying upon the said acquiescence and assent of the Government, plaintiff herein, this defendant did take title to said property last described.

That the plaintiff herein at no time made objection prior to the commencement of this suit to the mining of said land by this defendant's predecessors in interest or their successors to the removal from said land

and the disposal of the oil and gas produced from and mined upon said land; and by the payment during said period of large sums for taxes levied against said land and the improvements thereon and the product taken therefrom and also large sums assessed against said defendant's predecessors in interest by reason of the ownership of said lands for the general preservation of oil lands in said district including lands owned by plaintiff.

That during all of the period of time that the said defendant and his predecessors in interest were in possession of said land described in the bill of complaint herein and other lands hereinbefore referred to the said defendant's predecessors in interest and their successors did expend large sums of money in the care and protection of said land and in the preservation of the product obtained from the said land; that had the said defendant's predecessors failed to so do many hundreds of thousands of dollars in mineral products and lands would have gone to waste all of which facts were known to the plaintiff while this defendant's predecessors in interest were so protecting and preserving the said land and the products therefrom and therein; and this defendant alleges that frequently, subsequent to the said withdrawal order of September 27th, [91] 1909, the said land described in the bill of complaint herein and other lands referred to in this answer and the work being performed thereon by this defendant's predecessors in interest were visited by the plaintiff herein, its officers and agents, and the said plaintiff never at any time in anywise objected or in any manner protested

to said defendant or its predecessors in interest or objected to the operation of said land or to the improvement thereof or to the removal or marketing therefrom of any of the product from said land of either oil or gas.

That, on the contrary, this defendant is informed and believes and therefore alleges the fact to be that the said acts of the defendant's predecessors in the development, occupancy, and possession of said land, and disposition of the proceeds therefrom were fully approved, acquiesced in and assented to by the said plaintiff herein and no objection of any kind, character or description was ever made by the said plaintiff to the operation, maintenance, improvement and care of said lands by defendant, its predecessors in interest or their successors.

This defendant further alleges that for the years 1911, 1912, 1913, 1914, 1915, and 1916, this defendant and his codefendants made report and return to the plaintiff herein as to their respective incomes for all years from the year "1911" until the filing of the bill of complaint herein and that in all such reports and returns there was included all proceeds by this defendant's predecessors in interest herein from the sales of oil and gas obtained from the land described in the bill of complaint herein; that this plaintiff well knew that this return and report included the income of this defendant's predecessors in interest an successors derived from the sales of oil and gas extracted and produced from the land described [92] in the bill of complaint herein and the said land adjacent thereto, and said plaintiff so well knowing

the facts herein stated during each and all of said years did levy and assess a tax upon the incomes of each and all of the defendants and including a tax upon the income received by this defendant's codefendants from the sales of oil and gas produced from the land described in the bill of complaint herein.

This defendant further alleges that this defendant's codefendants herein, as he is informed and believes and therefore states the fact to be, did, pay to the said plaintiff said taxes so levied and assessed upon said income derived from the sale of oil and gas produced and extracted from the land described in the bill of complaint herein and said adjacent land and said taxes were received by plaintiff herein, with plaintiff's full knowledge of the facts herein stated during each and all and every of said years.

This defendant further alleges that the said plaintiff demanded the payment of said income tax from this defendant's codefendants; and this defendant further alleges that had the plaintiff not levied said tax and not demanded the payment of said tax and had it refused to accept the payment of said tax upon the ground that the said assessment was erroneous or illegal or upon the ground that the said defendants were not entitled to the income from or possession of said land or lands, the said taxes would not have been paid.

This defendant further alleges that by reason of the premises and by reason of the facts set forth in this answer the plaintiff herein is and ought to be estopped from maintaining this action. [93]

Wherefore, this defendant prays that the plaintiff

take nothing by this its suit and that the bill of complaint herein be dismissed.

2. That should the prayer of the defendant that the said bill of complaint be dismissed be denied, that this Court do order and direct that this cause be transferred from the equity to the law side of this Honorable Court to be there heard and tried by a jury.

3. And this defendant does further pray that failing the granting of the relief hereinabove prayed for, that this defendant do have such other and different and further relief as equity and good conscience shall require.

JORDAN & BRANN,
Attorneys for Defendant L. B. McMurtry.

[Endorsed]: B–10. In the District Court of the United States for the Southern District of California, Northern Division, Ninth Circuit. In Equity. United States of America, Plaintiff, vs. California Midway Oil Company, et al. Answer of Defendant L. B. McMurtry. Filed Dec. 11, 1917. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Jordan & Brann, Attorneys at law, Monadnock Building, San Francisco. [94]

In the District Court of the United States for the Southern District of California, Northern Division, Ninth Circuit.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CALIFORNIA MIDWAY OIL COMPANY, ASSOCIATED OIL COMPANY, COLUMBUS MIDWAY OIL COMPANY, 32 OIL COMPANY, L. B. McMURTRY, J. M. McLEOD and STANDARD OIL COMPANY,

Defendants.

**Decree of Dismissal.**

This cause having heretofore been heard and argued by counsel, and the Court now being fully advised in the premises, finds that the plaintiff is not entitled to the relief demanded or any part thereof,—

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the complaint be and is hereby dismissed.

R. S. BEAN,
Judge.

Dated, June 19th, 1919.

Decree entered and recorded this 23d day of June, 1919.

CHAS. N. WILLIAMS,
Clerk.
By Ernest J. Morgan,
Deputy.

**Assignment of Errors.**

Now comes the United States of America, the plaintiff in the above-entitled cause, and files the following assignment of errors upon which it will rely in its prosecution of appeal prayed for by it from the decree of dismissal entered in said cause by this Honorable Court on June 23, 1919:

I.

The Court erred in dismissing the bill of complaint and said cause, and in entering its final decree so dismissing said bill and cause.

II.

The Court erred in failing and refusing to hold, adjudge and decree that the plaintiff was and is entitled to the relief prayed for by it in its said bill of complaint, and in failing and refusing to adjudge and decree that the land described in said bill of complaint and the contents thereof were the perfect property of the plaintiff, free and clear of the claims of the defendants, or any of them. [98]

III.

The Court erred in finding and holding in substance and effect that the alleged mining location under which defendants claim was made by or for the persons in whose name it was made in good faith and with the intent on their part to lawfully acquire said land for their own use and benefit.

IV.

The Court erred in failing and refusing to find and hold that the alleged mining location under which the defendants claim was made in the interest

of and for the use and benefit of the defendant L. B. McMurtry, or some person or corporation other than the persons in whose names such location was made, to enable said McMurtry, or such other person or corporation, to acquire a greater acreage of the public mining land than could lawfully be acquired by one person under one mining location.

V.

The Court erred in finding and holding that the defendants California Midway Oil Company and Associated Oil Company "acted in the utmost good faith both in acquiring and purchasing the locators' interests and paying therefor, without notice, knowledge or suspicion that there was or could be any question about the *bona fides* thereof."

VI.

The Court erred in finding and holding in substance and effect that the defendants California Midway Oil Company and Associated Oil Company were innocent purchasers for value without knowledge or notice of any fraud or irregularity in the mining location under which they claim, and that such fact so found by the Court was "a circumstance not to be lost sight of in the consideration of the case" and thus holding in substance and [99] effect that such purchase by said defendants of the alleged interests of the persons in whose names such location was made entitled said defendants to rights to which otherwise they might not have been entitled.

VII.

The Court erred in finding and holding in sub-

stance and effect that the powers of attorney under which the alleged location of the land in suit was made, and under which the defendants claim, were executed by the persons whose names appear thereon, in good faith, for the purpose of lawfully acquiring for such persons public mineral lands.

VIII.

The Court erred in holding in substance and effect that the powers of attorney under which the alleged location of the land in suit was made, and under which the defendants claim, having been executed in good faith, any subsequent unlawful use of such powers of attorney by the agent, L. B. McMurtry, is immaterial.

IX.

The Court erred in failing to give proper weight to the evidence showing the circumstances under which the so-called Chicago powers of attorney were secured and the locations thereunder made in determining the *bona fides* of the alleged locations made by McMurtry under the so-called New York powers of attorney, under one of which locations the defendants claim.

HENRY F. MAY,
E. B. LACY,
Special Assistants to the Attorney General,
C. D. HAMEL,
Special Assistant to the United States Attorney,
Solicitors for Plaintiff. [100]

[Endorsed]: No. B–10—In Equity. In the District Court of the United States for the So. District of California, Northern Division. United

States of America, Plaintiff, vs. California Midway Oil Co. et al., Defendants. Assignment of Errors. Filed Dec. 15, 1919. Chas. N. Williams, Clerk. Maury Curtis, Deputy. [101]

---

In the District Court of the United States for the Southern District of California, Northern Division, Ninth Circuit.

No. B–10—IN EQUITY.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CALIFORNIA MIDWAY OIL COMPANY, ASSOCIATED OIL COMPANY, COLUMBUS MIDWAY OIL COMPANY, 32 OIL COMPANY, L. B. McMURTRY, J. M. McLEOD, and STANDARD OIL COMPANY,

Defendants.

**Order Allowing Appeal.**

It appearing that the plaintiff herein has heretofore filed its petition for an appeal from the final decree made and entered herein on June 23, 1919, dismissing its bill of complaint, together with its assignments of errors,—

IT IS HEREBY ORDERED that said appeal to the United States Circuit Court of Appeals for the Ninth Circuit be, and the same hereby is, allowed.

Dated this 15th day of December, 1919.

R. S. BEAN,
District Judge. [102]

[Endorsed]: No. B–10. In the District Court of the United States for the So. District of California, Northern Division. United States of America, Plaintiff, vs. California Midway Oil Co. et al., Defendants. Order Allowing Appeal. Filed Dec. 15, 1919. Chas. N. Williams, Clerk. Maury Curtis, Deputy. [103]

---

In the District Court of the United States for the Southern District of California, Northern Division, Ninth Circuit.

No. B–10—IN EQUITY.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CALIFORNIA MIDWAY OIL COMPANY et als.,
Defendants.

**Stipulation Re Statement of Evidence on Appeal.**

It is hereby stipulated and agreed that the statement of evidence lodged by the plaintiff, United States of America, with the clerk of the above-entitled Court on the 18th day of August 1920, may be approved by the Court or the Judge as the statement of evidence to be included in the transcript on appeal taken by said plaintiff in the above-entitled

and numbered cause to the United States Circuit Court of Appeals.

Dated April 4th, 1921.

HENRY F. MAY,
E. B. LACY,
Special Assistants to the Attorney General,
Solicitors for Plaintiff.

HENRY ACH and
EDMUND TAUSZKY,
Solicitors for Defendant, Associated Oil Company.

ROBT. M. PEASE,
Solicitors for Defendants, J. M. McLeod and Thirty-two Oil Company,

Apr. 12, 1921. [104]

JORDAN & BRANN,
Solicitors for Defendant, L. B. McMurtry.

GEO. E. WHITAKER,
Solicitor for Defendant, California Midway Oil Co.

PILLSBURY, MADISON & SUTRO,
Solicitors for Defendant, Standard Oil Company.

U. T. CLOTFELTER,
JORDAN & BRANN,
Solicitors for Defendant, Columbus Midway Oil Co. [105]

[Endorsed]: No. B–10—In Equity. In the District Court of the United States for the Southern District of California, Northern Division, Ninth Circuit. United States of America vs. California Midway Oil Company et als. Stipulation Re Statement of Evidence. Filed Apr. 22, 1921. Chas. N.

Williams, Clerk. By R. S. Zimmerman, Deputy Clerk. [106]

---

No. B–10—In Equity. In the District Court of the United States for the Southern District of California, Northern Division, Ninth Circuit. United States of America, Plaintiff, vs. California Midway Oil Company, Associated Oil Company, Columus Midway Oil Company, Thirty-two Oil Company, L. B. McMurtry, J. M. McLeod, and Standard Oil Company, Defendants. Statement of Evidence. To be Included in Transcript on Appeal in the Above-entitled Cause. Lodged Aug. 18, 1920. Chas. N. Williams, Clerk. By R. S. Zimmerman, Deputy Clerk.

Settled and Filed Apr. 22, 1921. Chas. N. Williams, Clerk. By R. S. Zimmerman, Deputy Clerk. [107]

In the District Court of the United States for the Southern District of California, Northern Division, Ninth Circuit.

No. B–10—IN EQUITY.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CALIFORNIA MIDWAY OIL COMPANY, ASSOCIATED OIL COMPANY, COLUMBUS MIDWAY OIL COMPANY, THIRTY-TWO OIL COMPANY, L. B. McMURTRY, J. M. McLEOD, and STANDARD OIL COMPANY,

Defendants.

**Statement of Evidence to be Included in Transcript on Appeal in the Above-entitled Cause.**

This cause came on for trial March 10, 1919.

APPEARANCES:

FRANK HALL, Esq., Special Assistant to the Attorney General, and CHARLES D. HAMEL, Esq., Special Assistant to the United States Attorney, for Plaintiff.

GEORGE E. WHITAKER, Esq., for Defendant California Midway Oil Company.

HENRY ACH, Esq., and EDMUND TAUSZKY, Esq., for Defendant Associated Oil Company.

ROBERT M. PEASE, Esq., for Defendants Thirty-two Oil Company and J. M. McLeod.

Messrs. JORDAN & BRANN, by WALTER S. BRANN, Esq., for Defendant L. B. McMurtry and Columbus Midway Oil Company. [108—1]

**Deposition of L. A. Shadburne, for Plaintiff.**

L. A. SHADBURNE, called by plaintiff on April 4, 1917, testified by deposition as follows:

I reside at 1019 Foster Avenue, Chicago, Ill. I am in the automobile business. Have lived in Chicago fifteen years. In 1903 I was with the American Lucol Company of New York. Knew L. B. McMurtry about thirty years ago in San Francisco, where I was born and raised. Met him in Chicago in 1903. I was stopping at the Great Northern Hotel and met him in the corridor. He made me a proposition to sell stock for him and

(Deposition of L. A. Shadburne.)

I went to work about two weeks before Christmas, and continued about a year selling stock in the Oriental Oil Company. Yes, he explained to me about the land he controlled in California. Q. Did he ask you to do anything respecting the acquisition of further lands or more lands in the State of California? A. I do remember him asking me to take a paper of some kind and description, anyhow, I can't hardly say, it was some paper that he had made out, and wanted me to deliver it to someone, I think it was to this man Dunbar. I introduced McMurtry to Dunbar. Don't think McMurtry told me the nature or purport of this paper. No, he didn't say anything about a power of attorney being secured to locate oil lands. He wanted me to deliver it to Dunbar, who was to get some signatures to it. I knew nothing about its contents. Later I think I got this paper back in the sealed envelope and mailed it to McMurtry. I never read the paper and don't know who signed it. I sent it to McMurtry at his instigation. He was president of the company, and, if you will pardon me, it is hard to refresh my memory on these things, it is so long ago. But I have a faint recollection of him mailing me this paper later, sealing and giving it to me and telling me to give it to Mr. Dunbar; and Mr. Dunbar was to get some signature, and if Dunbar didn't mail it back to him I was to go out there and get it and mail it to him, I remember that. I had no conversation [109—2] with Dunbar about this paper. Think a man

(Deposition of L. A. Shadburne.)

by the name of Love, who was cashier for the Bowles Live Stock Company at the Stock Yards, returned it to me. Am not sure who gave it back to me, but have a recollection of seeing Love when in there. Don't remember whether I delivered more than one paper to Dunbar; nor do I know how many papers were in the envelope I sent to McMurtry, or who signed them. I was assistant secretary of the Oriental Oil Company so I could sign stock for McMurtry; acted only in Chicago. All I know about the lands the Oriental Company owned or held under contract or leases is what I saw in letters and papers that McMurtry had. I severed my connection with this companw because McMurtry took all the money and didn't pay us. The lands held by this company were in the Coalinga District. Yes, McMurtry said they held 1,000 acres on which were three wells, in the Northern Midway, Midway Valley, or Kern County Valley. I don't know the description of these lands or the names of the claims or what became of these holdings. Yes, I had a certain recollection that McMurtry said he was going to use the papers I took to Dunbar to take land with. I don't think he had to tell me what kind of land, because I knew he was in the oil business. That is what he would be taking up. He said he intended taking up lands in Kern and Coalinga—what you call the Midway District, for the Oriental Oil Company with the papers I took to Dunbar. Yes, my understanding was that the Oriental Oil Company was to get all the benefit

(Deposition of L. A. Shadburne.)

from the execution and use of those papers. No, I don't think the company did, because I didn't get any. No, I have never at any time located any lands.

Cross-examination.

No, I have no recollection of any conversation with McMurtry in which he mentioned the county, township or range where these lands were to be located. [110—3]

**Deposition of Charles A. Dunbar, for Plaintiff.**

CHARLES A. DUNBAR, called by plaintiff April 5, 1917, testified by deposition as follows:

Reside in Chicago, and am one of the firm of Walters & Dunbar, livestock commission merchants; was in the same business in 1903, employed by the Bowles Livestock Commission Company. Was introduced to L. B. McMurtry in Chicago 13 or 14 years ago, by Len Chadburn. Had two or three deals with McMurtry in regard to some stock in the Oriental Oil Company which Chadburn was promoting. I didn't buy any stock, but secured some. McMurtry borrowed $500 from me. At the time, I didn't know that the Oriental Oil Company was broke, and he gave me 10,000 shares. Don't know whether it was as a bonus or security. He said, "If this company goes right it will make you rich." The attempt to sell me the oil stock covered a period of probably six months, possibly a year, and I assisted him in making some sales on it. Yes, I am the C. A. Dunbar who signed that power

(Deposition of Charles A. Dunbar.)

of attorney (Plaintiff's Exhibit 9). Am a little hazy as to the circumstances. As I remember it, at that time, I was dealing with Mr. Chadburn to go to California to work for the Oriental Oil Company, and during our different conversations he said that there was some—that Mr. McMurtry wanted to get some signatures to a paper for some cause, and I have forgotten what it was; I knew about what it was for. He asked me if I could get him any signatures, and I told him yes, I could get him any amount of signatures to any paper he wanted. Mr. Chadburn came out to the stockyards, and he said it would be necessary for them to be signed before a notary public in the office where I worked. Mr. W. R. Love is a notary public, and I told Mr. Love that he probably could get a little extra money by getting those signatures to this paper and to catch those fellows as they came in the office, and get them to sign it. And I may possibly have sent some of them in and probably brought one or two of [111—4] them in; I don't just remember. Q. Do you remember whether you talked to any of those people about signing it? A. Yes, I think I did talk to some of them, asked them if they would sign a paper Mr. Love had in there, as a favor to me. Q. Did you make any explanation to them as to what the nature of the paper was, or what it was for? A. I don't think so. Q. Did any of them ask you what it was they were signing? A. No, not that I remember.

I signed it out of friendship for Chadburn and

(Deposition of Charles A. Dunbar.)

McMurtry. Didn't know it amounted to anything. Had no intention whatever of taking up any public lands for my own benefit or use. Don't recollect that McMurtry ever said anything to me about this paper. Chadburn said he wanted it for McMurtry to use for the Oriental Oil Company. Don't recall that he said how it was to be used. Didn't know my name was to be used in the location of oil lands, nor did I have any intention of claiming any lands that my name might be used to locate. Didn't know I was signing a location of that kind.

Q. Did Mr. Chadburn tell you it was for the Oriental Oil Company? A. I don't just remember, but he said he wanted those signatures for Mr. McMurtry; I liked McMurtry very much, thought a great deal of him. I was doing that as a personal favor to Mr. McMurtry. Q. Did you ever intend by signing this power of attorney to acquire a patent to any public oil lands in the United States? A. I didn't know that I had any. At that time I didn't know that I had any right whatever to oil lands of any kind.

No, no one explained to me what rights I would have if my name was used by McMurtry under this power of attorney. I didn't know what lands my name had been used to locate until they were described just this moment. Never knew where it had been used. I heard within the past six months that it had been used. After having this power of attorney signed and signing it myself, the next I heard of this [112—5] transaction was last sum-

(Deposition of Charles A. Dunbar.)

mer when a federal agent called on me. Haven't seen McMurtry since I loaned him this $500, and don't recall talking with Chadburn or any of the other signers about it. Remember most of those whose names appear on these powers of attorney (Plaintiff's Exhibits 8 and 9), as being around the stockyards. Mr. Love and I were instrumental in getting the signatures; I asked some of them to sign. Took them as they came in the office, wherever we thought a man would sign, we asked him. I didn't explain to any of them just what they were signing or what the rights would be under the laws of the United States. I couldn't make any explanation in that respect at all, because I didn't know myself. They signed as a favor to Love and myself more than any other reason. At that time around the stockyards it was very easy to get a man to sign his name to a paper of almost any description. There were papers of some kind circulated through that building every week, even to this day, asking for signatures. It was formerly our custom to sign them.

Cross-examination.

I am 42 years of age. In 1903 my salary was about $250 a month. Have been in my line of business for 23 years there in the stockyards. Have known Love about 20 years. Yes, I have been paid my $500, and still like McMurtry. Am still friendly with Chadburn, talked with him a few minutes yesterday. He told me he had forgotten about having signed the paper of that kind out there. Don't

(Deposition of Charles A. Dunbar.)

think he gave me any papers; think he gave them to Love. No, I haven't talked this over with Love; haven't seen him for six months. He was in Oregon the last I heard of him. Yes, Chadburn came to me at the stockyards and talked about getting signatures. Never talked with McMurtry about getting signatures. No, he didn't then owe me money. This $500 he borrowed after that. Don't think I talked with him [113—6] at the time he borrowed this $500 about having obtained the signatures. Didn't ask him what he had done with the powers of attorney, nor did he tell me. I couldn't say positively that I asked any of these men to sign that power of attorney. Don't remember any part of any conversation with any of them at the time. Yes, Love was a man of integrity and I wouldn't ask him to do anything wrong. Didn't think I was doing wrong. It was simply fulfilling his duty as a neighbor for anyone signing that paper, would acknowledge. Don't believe I read the paper; many a one I have signed without reading it. Didn't have that paper in my hands that I remember. Chadburn told me what he wanted, wanted some signatures on a paper, and I went with him, as I remember, to Mr. Love and told him Mr. Love might be able to get signatures on the paper. He probably told me what it was. I didn't read it, that I remember. Don't remember what he told me it was. Yes, he may have told me it was a power of attorney authorizing McMurtry to locate oil lands and mineral lands out west. But I don't remember

(Deposition of Charles A. Dunbar.)

his doing so. Wouldn't say he didn't. Yes, think he asked me how many signatures I could get, and I told him as many as he wanted. As I remember, Love had the paper, and said, "I would like to have your signature." Don't remember that any of them asked me its character. Don't remember whether anyone was present when I signed as the last one, and don't know what was done with the papers after they were signed. No, it is not true that I mailed them. It is absolutely untrue. I have no recollection of anything of the kind. As I remember, Chadburn came out there and got those papers himself, and paid Mr. Love his notary fees. Think I have a recollection of seeing Love deliver the papers to Chadburn. Am quite positive about that. [114—7]

**Deposition of Jesse I. Cunningham, for Plaintiff.**

JESSE I. CUNNINGHAM, called by plaintiff April 5, 1917, testified by deposition as follows:

I live at 7721 Lawrence Avenue, Chicago. Am clerk for the Illinois Central Railroad. In 1903 I lived in Chicago and was with the Bowles Livestock Commission Company, at the stockyards, and knew C. A. Dunbar. I am the person whose name appears on that paper (Plaintiff's Exhibit 8). Don't remember very much about it, talking to Mr. Love, the notary, at that time, and some bookkeeper of the Bowles Livestock Company, he kind of brought it to my mind. I remember the crowd of men that entered at this time. It happened in the

(Deposition of Jesse I. Cunningham.)

Bowles office. Who the party was I don't remember. I remember Mr. Love asking us in and having us sign this paper. Don't remember that it was then explained to us or who signed it. This was all told to me afterwards. Can't remember at all what it was for. If I signed it it must have been my intention to allow somebody to locate me on public lands. It must have been explained to me at that time. I don't know. No, I didn't then know McMurtry. Met him in San Francisco in November or December, 1916. Prior to meeting him I had not learned how many locations my name had been used in making. I have heard my name was used in locating 44 acres out there. Never spent any money in the development of oil or other minerals upon any lands covered by locations made in my name. Suppose my intention with respect to the public lands when I signed that power of attorney was speculation—taking a chance. I expected to get my share of it,—fifty-fifty, I think it was to be split, with the man that signed for it. Q. Was that Mr. McMurtry or Mr. Love? A. I guess Mr. McMurtry had Mr. Love have us sign it. Q. Did you expect to give a part of your interest to someone else? Mr. ACH.—I object to that as leading and suggestive. The WITNESS.—Well, we were supposed to go half and half, I think, was all they said. [115—8]

Mr. HALL.—And you were to go half and half with whom? A. We was to spend no money at all, wasn't to give us one cent, one penny at all, just

(Deposition of Jesse I. Cunningham.)

the right of signing our name was the way I understood it, that was the way it came to be signed. Q. You were to get half of it and someone else was to get the other half of that arrangement? A. I suppose the whole thing was divided up and fifty per cent of the money belonged to the people who signed and the others that leased the stuff were to get the other half. Yes. I was willing that this should be done. David G. Cunningham was my father, and he is now dead. I heard he signed this paper, but never saw his signature or talked to him about it, and cannot remember whether he was in the room when I signed. It is so far back and there were so many there I can't remember. He was a salesman at that time.

Q. The records of Kern County show that on January 1, 1907, there were located, in Kern County, California, the following placer mining locations on which yourself and seven others appear as locators, to wit: The Indiana Claim, embracing the northwest quarter of section 22; the Iowa claim, embracing the southeast quarter of the southwest quarter, the south half of the southeast quarter, and the northwest quarter of the southeast quarter of section 28; the Harrison Placer Mine location, embracing the northwest quarter of section 34; the Modoc Placer Mining Claim, embracing the northeast quarter of section 20; the Wilgus, embracing the northeast quarter of section 26; and the Georgia Placer Mining Claim, embracing the northeast quarter of section 32, all in township 31, range 23;

(Deposition of Jesse I. Cunningham.)

also the Maine Placer Mine, embracing the northeast quarter of section 9, and the Vermont Placer claim, embracing the northeast quarter of section 4, township 32, range 23; did you ever, at any time, possess any of the lands which I have just described? A. No, sir. No, since January 1, 1907, I never did any act toward the development of oil [116—9] or other minerals upon those lands, nor have I ever expended any money for that purpose, or attempted to convey those lands by deed, lease or otherwise, or do anything with respect to them after January 1, 1907. Prior to going to San Francisco, in 1916, I never had been advised by McMurtry of anyone as to what disposition had been made of those mining locations, nor have I ever received any money from the proceeds of oil or from the sale or leasing of those lands. Before going to San Francisco in 1916 I never communicated with McMurtry or anyone with respect to any right I might have had in those lands. After signing that power of attorney, the next I heard about the transaction was during the summer of 1916, when Mr. Favorite, an official of the Government, interviewed me at my home. I then told him what I knew about it. No, I never learned that these lands were relocated January 1, 1909, by McMurtry, as attorney in fact, for other parties, and I never gave my consent to the surrender of those mining claims, nor did I, other than by this power of attorney I signed December 21, 1908, authorize McMurtry to make a deed, dated April 14, 1908, conveying part of these lands to H.

(Deposition of Jesse I. Cunningham.)

C. Stratton, or to enter into a contract, dated October 8, 1908, with J. M. McLeod, affecting part of these lands. Prior to going to San Francisco I hadn't learned that McMurtry, as my attorney in fact, had allowed those mining locations to lapse and become of no effect, nor did I ever authorize McMurtry to cover the lands covered by locations on which my name appeared with the so-called New York locators on January 1, 1909.

Cross-examination.

When Mr. Favorite came to my house last summer he stated his mission and asked me if I had any interest in lands in California. I told him no. He then asked me if I ever sent anybody there to draw lands for me or give anybody a power of attorney, and I said no. [117—10] He then wrote up some kind of an agreement to that effect and read it to me and I signed it. I believe he said he was a notary. No, he didn't show me any papers or tell me that the records showed that the names of Jesse I. Cunningham and David G. Cunningham had been used by McMurtry to make locations of lands out there, or what other names had been used. That is the paper I signed (Defendants' Exhibit 6). Defendants' exhibit offered and read into this deposition and is as follows:

**Defendant's Exhibit No. 6.**

"Jesse I. Cunningham, of 7721 St. Lawrence Avenue, Chicago, Illinois, being sworn says:

"In 1903 I was living in Chicago and was work-

(Deposition of Jesse I. Cunningham.)

ing for the Bowles Livestock Commission Co., at the stockyards in Chicago. My father's name was David G. Cunningham. He is now deceased.

"I do not have any recollection of anyone ever having talked with me about filing on land or making location of land in California, and have no recollection of ever having given anyone a power of attorney to locate or file on land for me. I do not know L. B. McMurtry. I did not know that my name had been used as a locator on claims in California, until informed of that fact by Special Agent Favorite. If I ever signed a power of attorney for anyone empowering him to make locations of Government land for me, I signed the name without knowing and understanding the contents of the paper. And if any locations were made in my name they were made without my knowledge and without any authority from me.

"J. I. CUNNINGHAM.

"Subscribed and sworn to before me this 9th day of August, 1916, at 7721 St. Lawrence Ave., Chicago, Ill.

"J. H. FAVORITE,
"Special Agent."

Yes, during the twenty days I was in San Francisco, I met some of these Chicago people, among whom were Morningstar, Rentschler, the two Dennisons, Bacon, Lee and Newhof. I talked with them and found that they, too, had been locators in land in California, through McMurtry. Some of them said they had signed powers of attorney. No, I

(Deposition of Jesse I. Cunningham.)

didn't tell them I did not; I told them I didn't remember signing it. They tried to refresh my memory, and brought it out to me. I then recalled certain circumstances—they brought it back to me in a faint way. After I returned to Chicago I went over to [118—11] *to* the yards one day, where I used to work at the time this signing happened, and I was talking to Mr. Love, the notary public before whom we signed; I told him that, and we talked in a general way about it, and then he brought it back to my mind. He says, "Don't you remember the time you came in and we walked over to that corner?" and I remembered, because the office is changed from what it used to be. He said, "We had that board that we let down." And I had a faint recollection of the crowd being there. Yes, I now remember signing some paper at the time mentioned. No, at the time I signed Love didn't say anything to us. C. A. Dunbar was present then, and four or five of us who were working with the Bowles Livestock Company. Don't recall who they were, or whether Dunbar signed. He was a salesman for the firm I was working for. Don't remember who spoke to me about signing, or a single word then spoken. Don't know what was in the paper I signed or who the other signers were. I remember there was a crowd there. I have heard so many things afterwards that I can't say I remember it myself. Yes, I testified on the stand at San Francisco that I didn't remember signing that paper, and that if I did sign such a paper I had no inten-

(Deposition of Jesse I. Cunningham.)

tion of taking up oil lands in California or elsewhere under the public land laws of the United States or claim any interest in such lands. No, I didn't then remember about this fifty per cent interest in any land. Q. Who told you that? A. I had a faint recollection of it before I testified the second time; I wasn't so sure about it. * * * Q. Who told you anything about fifty-fifty? A. It was not fifty-fifty, exactly. If these lands ever came to anything he would split, that is the way it was. Q. Who said that? A. McMurtry. * * * Q. How do you know he did? A. That is what I was told. Don't remember who told me. I just remember the facts in connection with the conversation. Don't remember just exactly who, told me when I signed the [119—12] paper. I have got a faint recollection of the details at that time.

Q. Where did you get that from? A. It was just kind of brought back to my mind. Q. Who brought it back? A. When Mr. McMurtry was talking about this, signing it, two or three months ago. I remember somebody said, "It won't cost you nothing; go ahead and sign it." That is the only thing I remember distinctly, yes.

Q. Listen, Mr. Cunningham, now. Nobody ever proposed to you that you should lend them your name so that they could go out and get more land from the Government than they were entitled to and commit a fraud upon the Government, would you be a party to doing it? A. No, sir. Nobody said that to me. Q. Nobody ever came to you and said,

(Deposition of Jesse I. Cunningham.)

"Here, let us have your name, somebody wants to get some land from the Government, more than the law entitles them to," would you do it? A. No, sir. Q. Did you ever intend that your name should be used so that anybody else could go in and get land from the Government for themselves? A. Not unless I was equal with them, got something out of it, too. Q. The truth of the matter is that you now remember that matter in about this way, isn't it, that in the hurry and flurry of your business somebody came along and said, "Here is a chance to make some money land-locating out in California; sign a power of attorney, and if anything comes out of it you may get some money out of it," isn't that about the idea? A. Yes, sir. Q. There wasn't any more or less to it, was there? A. I can't remember; all that was said about that was that we was to get something out of it. [120—13]

**Testimony of William R. Love, for Defendants.**

WILLIAM R. LOVE, called on behalf of defendants, testified in open court as follows:

Reside at Walla Walla, Washington. In December, 1903, I was cashier for the Bolles Livestock Commission Company, at the stockyards, Chicago, Illinois, of which company I was subsequently a director and secretary. Was with this company until two years ago, beginning in 1899, then I resigned because of ill health. While there was notary public for Cook County, Illinois. Never met L. B.

(Testimony of William R. Love.)

McMurtry or receive any letter or telegram from him, or message of any character from any source. Did not keep any record of my notarial work. Don't think the law requires it. Knew C. A. Dunbar there at the stockyards. Had known him about three years prior to December 21, 1903. Had no personal acquaintance with man by name of Shadburne. Never had original powers of attorney (Plaintiff's Exhibits 8 and 9) in my personal possession. Yes, they were given to me for my signature as notary. I was at that time keeping books and acting as cashier. One afternoon this man you call Shadburne and Mr. Dunbar were out in the outer office talking to a number of our employees and some outsidemen about the matter in question. That was the first I knew of it. I don't recollect stopping my work behind the desk and going out among them, but I do recollect that the sum and substance of it all was a request for powers of attorney to file on land. The boys laughed and joked about it a good deal. Both Mr. Shadburne and Mr. Dunbar were standing up talking to the boys as they sat along the side of the office. When it came to signing the documents these men filed by my desk and signed it in front of me on the counter-projection of the desk outside of the railing. The next morning Mr. Shadburne was back at the yards. I remember him as being out in the hall. I recall Mr. Dunbar coming into the [121—14] office about noon and he and Mr. Shadburne stepping up to the end of my desk where I attached my notarial seal and signature. Mr. Shadburne then

(Testimony of William R. Love.)

offered me or tendered me $15 for my services. I remonstrated and said it was too much, that I had never assessed anybody a notarial fee of that size, but he in turn said that it was right and insisted upon my taking it. He and Mr. Dunbar left the desk with the papers. Those things I remember very distinctly. Yes, I took the acknowledgment of all these persons whose names appear upon these powers of attorney on which my name appears. Don't recall hearing Shadburne or Dunbar say anything on the subject of whether the locations, if made, would ever prove or as to whether they might prove valuable. But I had the impression that this land, if it be proved valuable, would be a good thing for the boys who were signing the powers of attorney. I recall the remark of someone in a jocular way about Mr. Newhoff, that it would be a joke if Sammy had to go and sit on a sandhill for a couple of months to prove up his claim. I recollect a man by the name of Hokan Role, but don't recall meeting him at that time. But he must have signed the paper or I wouldn't have acknowledged it. This applies to J. A. Bacon also. I knew all the people whose names appear on these powers of attorney, more or less. Some of them, of course, better than others. But I do know this—that never in my life have I attached my notarial seal and my signature to any document the signatures upon which I did not actually witness. Don't recall reading the powers of attorney as I was very busy at the time. Don't recall any specific statements made by anyone at that time con-

(Testimony of William R. Love.)

cerning this matter, but the general impression was that if this land was valuable—proved to be valuable—the boys would have the right to sell it—and I don't know whether it was thought that any particular person [122—15] would buy it or not.

Cross-examination.

One of these men who signed one of these powers of attorney was named Pierce, not Price—his name was R. E. Pierce, not R. E. Price. I knew a Converse there, who is now dead. I don't recall his initials. There was A. J. Rowley there. Also W. J. Nichols, not Michals. I never went into the details concerning the signing of these powers of attorney. However, I did have, as I said, the impression that it was filed on land that might be valuable, and the boys couldn't lose, and they might make something. That was the general impression. I don't think they thought they would make a whole lot. Q. Did the boys have the idea there in the conversation that you overheard that they would have to drill oil wells? A. My recollection is that it was spoken of as mineral lands. Q. Well, did you get the impression that it was gold lands they were dealing with or— A. My impression was that it was a mineral land proposition. Q. And you don't remember anything having been said about oil wells or— A. I don't remember anything said about oil lands. Q. Did you hear anyone attempt to detail to the men who signed these instruments what their rights were under the mineral laws of the United States? A. No, because that talk was all outside while I was

(Testimony of William R. Love.)

back of the desk working. Think McMurtry's name was mentioned. I recall that Mr. Dunbar knew Mr. McMurtry, and that is the connection in which Mr. McMurtry's name comes to me. Don't recall anything being said about McMurtry being an expert in the oil business or a man who was likely to make money out of this transaction. Don't recall having talked with any of these men as to their idea of their rights in the transaction or the extent of their interest in any location that might be made under this power of attorney. [123—16] Nor do I recall hearing any of them say anything about advancing money for the development of any property that might be located. Q. As I understand it, on the contrary, you heard them say that it would not cost them anything and they would not be liable for anything; is that correct? A. I don't recall that. I recall the thought that they might have to go and sit on it for a couple of months to get it. Yes, that came about in jesting over Newhoff. Yes, the boys treated it in a rather jesting sort of way. I think the boys felt, however, that if the land later proved to be valuable they might have to pay some tax fees or some little things like that. Don't recall hearing any of them say anything definitely about selling his interest; but that seems, as I recall it, to have been the impression, that they might sell it later on. It seems to me that the information was that they could take 20 acres each. Didn't hear anything said about an association entry. As I recall it, there were two or three of these instruments.

(Testimony of William R. Love.)

Redirect Examination.

The only Lee I knew was Tom Lee. Don't recall that his middle initial was H. I don't recall having asked any of these men to sign this power of attorney.

It may be that I introduced Shadburne to Nettles, but I didn't know enough about the proposition to elaborate upon it for anybody to sign it. I may have introduced Mr. Shadburne, however, to some of the boys that following morning while waiting for Mr. Dunbar. [124—17]

**Testimony of Charles W. Nettles, for Plaintiff.**

CHARLES W. NETTLES, called by plaintiff, testified February 18, 1919, in open court as follows:

Am a bookkeeper and land salesman for Fresno Farm Land Company and reside at Kerman, California. Lived in Chicago in 1902 and was bookkeeper for Charles E. Harding Company, which was engaged in the livestock business about twelve years. Knew Charles A. Dunbar and W. R. Love in 1903.

I am the C. W. Nettles whose name appears on that power of attorney (Plaintiff's Exhibit 8). Signed it in the Exchange Building. It was presented to me by Mr. Love. The only thing he said was that this gentleman was to represent different parties in locating this land. Yes, I mean McMurtry, if that is the party. Had never known McMurtry, and I had never before made any location on public lands, either mineral or nonmineral, and was not familiar with the public land laws. Don't remember the details of what Mr. Love said. Noth-

(Testimony of Charles W. Nettles.)

ing was said about how many claims would be located. I didn't then know the number of acres contained in an association claim. I presume I knew at that time the interest each person would have in an association placer mining claim, but don't remember at this time. Nothing was said by Mr. Love to me as to how this matter would be handled, or by whom, and I had no information as to who would handle this transaction. Presume there was some statement made at that time as to what my interest would be in any claim that might be located under the power of attorney, but I have forgotten what it was. I do not know and did not at that time have any knowledge as to what I might receive out of any claims that would be located under this power of attorney. Don't remember that anything was said by Mr. Love as to what I might receive. Had no intention of expending any money in the development of oil lands and never was asked to expend any money in the development of any [125—18] oil lands that were located in which my name appeared as locator.

Q. The records of Kern County disclose that your name appears with the names of seven others as locators of the following lands: The northwest quarter of section 34, the northwest quarter of section 20, the northwest quarter of 22, the northwest quarter of 26, and the northwest quarter of 32, in township 31, range 23, in Kern County, California. When, if at all, was the first time that you learned that your name appeared as the locator upon those

(Testimony of Charles W. Nettles.)

quarter sections which I have named? A. Practically to-day.

After I signed the power of attorney I never made any inquiry as to what had been done under it and never received any money or thing of value by reason of the fact that I executed it or by reason of the fact that my name appeared upon the location notices upon these several quarter sections of land. Never was requested to consent to any transfer or any leases of any of these lands and was never advised by anyone that there had been transfers of leases of lands upon which my name appeared as locator. I presume that at the time I signed this power of attorney something was said by Mr. Love as to what I might get out of the transactions growing out of such signing but I don't remember what it was. I signed it because it was expected, I presume, that we would get something out of it, naturally; I didn't know what I expected to get; presumably that was in the hands of Mr. Dunbar and Mr. Love; I had no idea as to what proportion of the proceeds I might get and don't remember who was to determine that.

Cross-examination.

Q. When you signed that power, Mr. Nettles, did you sign it in good faith and with honest intent?

A. I certainly believe so, yes, sir. [126—19]

Q. Did anybody at any time ask you before signing that power of attorney, or at the time of signing the power of attorney, to lend your name so that any other persons could avail themselves of any rights for

(Deposition of Simon Newhof.)

their benefit under the mining laws of the United States? A. No, sir. [127—20]

**Deposition of Simon Newhof, for Plaintiff.**

SIMON NEWHOF, called by plaintiff April 5, 1917, testified by deposition as follows:

Reside at 4015 Calumet Avenue, Chicago, Illinois. Am purchasing agent at the Union Stockyards. In December, 1903, was in the ordering and buying business at the stockyards for myself. I signed my name to a document and that must be the one (Plaintiff's Exhibit 8). The only memory I have of the deal is, Mr. Dunbar is the one that got me to sign it. I don't recall if Mr. Love was there. Mr. Dunbar did not explain to me what I was signing. He explained it in this way, he explained to me—he called me in, as I remember, my brother I think was here at the time, and asked me if I would sign my name to a document. He said it was for a party that wanted to file on lands. He says, "It is not worth much now, but it might be worth something some day. It will not cost you anything." I refused to, but he worked on me and I finally signed my name to the document. I didn't read the document. Had I seen what I read over when in California I would not have signed it. The first time I read it was when I was in San Francisco. I signed that paper in Mr. Bowles office, where Mr. Dunbar and Mr. Love worked. Heard nothing more about it until Mr. Favorite interviewed me before I went to San Francisco. Before that I

(Deposition of Simon Newhof.)

knew nothing about the location of land in California in my name, and didn't know about my name appearing to any document until I was so informed by Favorite. Never paid a cent to do anything toward developing oil or other mineral upon any of these lands. At the time I signed the paper the proposition was pur to me in this way. I refused to sign it at first, and Mr. Dunbar was coming after me and wanted me to sign it. I said, "Well, I will sign it for you." He said, "You ain't losing anything, it is not costing you anything.; it ain't worth nothing now; it may be worth something some day." I done it more for personal acquaintance than anything else, personal [128—21] acquaintance with Dunbar, and as a matter of speculation. Nobody broached the subject of my putting up any money, or said anything as to what rights I would have in each claim that might be located. No, I didn't then know that I would be entitled to 20 acres out of each claim on which my name appeared. The only thing I knew about it was Mr. Dunbar explained, to me, said, "Put your name down here, and it may be valuable to you some day," and that is the only way I came to put my name down there. There was nothing said at all in regard to anything. Didn't know McMurtry then; first met him in San Francisco. No, I never consented that McMurtry might surrender whatever benefits flowed to me by reason of that power of attorney and relocating those lands in the name of

(Deposition of Simon Newhof.)

other people, and didn't know that it had been done until I learned of it in San Francisco.

Cross-examination.

No, nobody ever advised me to go out there and apply for a patent, and I didn't consider that I would or not. If I was a friend of yours and you had a document and asked be to sign it and I balked on it, and you had come up to me and would say, "It will not cost you anything," and you being an acquaintance, if a person would go ahead and ask those questions and get around me to sign it, naturally I would put my name down there. I put my name down as a speculation. Yes, it was for speculation, and for a matter of friendship also. [129—22]

**Deposition of Harry B. Rentschler, for Plaintiff.**

HARRY B. RENTSCHLER, called by plaintiff April 5, 1917, testified by deposition as follows:

Have resided at 4329 South 23d Street, Omaha, Nebraska, since 1916. Prior to that time I resided in Chicago for 25 years. In 1903 I was selling cattle for the Bowles Livestock Commission Company, and knew C. A. Dunbar a long time before that; also knew W. R. Love. It is my understanding that I signed that power of attorney (Plaintiff's Exhibit 8). Remember I signed a paper in the office there, don't remember the date. Dunbar brought in this gentleman and introduced him, and through him I signed it. I have since heard it was McMurtry. Am not sure. Never met the man

(Deposition of Harry B. Rentschler.)

before or since. I hope to get something out of it some time. That was the conversation. My recollection is it was Dunbar who told me this but am not sure. The conversation was—I objected to signing this paper at that time. I remember of making the remark, "What do I want to sign a paper like that for?" and he says, "Why, it will not cost you anything, and you might get something out of it some time." That is the way I remember it. Have no recollection of his telling me how I would get anything out of it or from whom. Never was asked for a cent, nor did I spend a cent. I never intended to. Have never asserted any right of ownership to the lands located under this power of attorney as described and never intended to secure a patent from the United States for them. Haven't given it a thought that I know of since the time those papers were signed—in fact, it slipped my mind. For a while, after it came up, I couldn't remember anything about it until I got to thinking over it. No mention was made to me about this until possibly two weeks before a Government official called on me, early last fall. There was quite a little kidding each other around the yards about it. I then thought it a joke. I never had any conversation or communication [130—23] with McMurtry about selling or disposing of those lands.

Cross-examination.

Yes, it is true that at the time I signed that paper something was said about its being given for the

(Deposition of Harry B. Rentschler.)

purpose of filing on Government land for a prospective deal, with the hope that it would become valuable some day. I read the paper and thought I knew what I was doing. My recollection is that I knew locations were going to be made for the purpose of trying to find some oil lands. Don't remember of any talk as to paying for the lands, and I understood that it didn't cost me anything. Q. There was no such talk as that? A. I don't remember any. Q. Did you enter into any arrangement at that time with Love or Dunbar, or the other man that was there, whoever he was, that they could use your name for the purpose of taking up lands for themselves? A. No, it was this here gentleman that was with Dunbar, that Dunbar brought into our office— Q. I want to know from you whether you agreed with anybody that they should use your name to get more land from the Government than they themselves were entitled to? A. I did, when I signed this paper, the way I remember it, because they would be locating lands in my name, that is my understanding. Q. It was for your benefit? A. I understood I would benefit from it. No, I never intended to give anybody a chance to defraud the Government. [131—24]

**Deposition of Franklin H. Denison, for Plaintiff.**

FRANKLIN H. DENISON, called by plaintiff April 5, 1917, testified by deposition as follows:

Reside at 6229 Ellis Avenue, Chicago. Am cashier for the Globe Rendering Company. Have

(Deposition of Franklin H. Denison.)

lived in Chicago more or less since 1871, and was there during December, 1903, in the same employment as now, in the Exchange Building, Union Stockyards. Knew C. A. Dunbar, who was a livestock cattle salesman for the Bowles Livestock Commission Company, and W. R. Love, who was secretary and bookkeeper for the same company. Presume I am the F. H. Denison whose name appears on that power of attorney (Plaintiff's Exhibit 8). I remember very vaguely executing such a document. As near as I can determine—this is a long while ago. I was an acquaintance of Charley Dunbar, and at his suggestion and the suggestion of Mr. Love I signed those papers. I presume I read it. Don't think I ever put my name to a paper without glancing over it. Can't remember exactly what was in those papers at the time. My impression now is that I was informed that this man wanted to locate lands out there, that they might become valuable at some time, and if they ever amounted to anything we would get our share. There was no explanation as to what my share would be or how many claims would be located in my name. Can't tell you who the man was who was to make the locations for me. Yes, I assume it was L. B. McMurtry, but am not positive. No, at that time I had no intention of spending any money in development or discovery of oil or other mineral on any lands that might be located in my name or to secure a patent from the United States. Think it was represented to us that there would

(Deposition of Franklin H. Denison.)

be no expense to us or the signers. If there was any expense of that kind Mr. McMurtry or whoever this man was would pay it himself. Am positive it was represented to us that we would be under no obligation. No explanation was made to me as to what my rights would be [132—25] under each location, and I didn't then know. Don't think I ever heard of the transaction until the officials of the Government were looking for some of the parties who gave their power of attorney to this man. I had forgotten about it. This official didn't see me in Chicago and I didn't see any Government officer about it until I arrived in San Francisco on subpoena in November, 1916, at which time I first learned that my name had been used as a locator upon oil land by McMurtry. Have never claimed any interest in the lands located in my name, which have been described, or exercised any act of ownership over them. Never knew until this case came up that I had anything to claim. If there is anything there I want it. Never authorized McMurtry to surrender any right I might have had in those lands.

Cross-examination.

Q. You knew that you had signed a paper by which it was intended that some agent in California might locate some oil lands? A. At that time I didn't know there was any oil lands. I thought it was homestead rights, and have been of that mind since. No, in signing that paper I didn't intend to perpetrate a fraud for the benefit of any-

(Deposition of Franklin H. Denison.)

body. At the time it was represented to me and was my understanding that I would have no costs to pay; but if he had represented to me that there was something there by my putting up a little money I would have put it up.

Redirect Examination.

Never was advised that it was necessary for me to put up any money to develop those lands or that they were valuable oil lands prior to November, 1916, when I was in San Francisco. [133—26]

**Testimony of Bert S. Denison, for Plaintiff.**

BERT S. DENISON, called by the plaintiff December 7, 1916, testified in open court as follows:

Am 38 years of age, a bookkeeper, and reside at Freewater, Oregon. In December, 1903, was a bookkeeper for the Bowles Live Stock Commission of Chicago. Yes, I signed that power of attorney (Plaintiff's Exhibit 9), there in the office before Love, as a favor to Charlie Dunbar, who worked for the firm. He said this Mr. McMurtry wanted to locate some land, and he needed some people to give him a power of attorney, and asked me if I, amongst others, would be one of them, and I said I would. Nothing was said as to what my interest would be in any lands that might be located, and I had no understanding or knowledge as to that. Had no intention of claiming a one-eighth interest in any lands located in my name or expending any money for development, and have never claimed any such interest.

(Testimony of Bert S. Denison.)

Cross-examination.

May not have known all of those who signed this power of attorney, but knew most of them and they were of good repute. Nothing Dunbar said led me to doubt the good faith of the transaction. Did not know McMurtry was to locate oil lands in California under that power of attorney, but knew he was to locate lands—that was all that was said. No, I didn't think I was going to deceive anybody, but thought the transaction was just what it appeared to be. Didn't intend to empower anyone else to take from the Government anything they or I might not be entitled to. Knew it might be used on Government lands anywhere. No, did not expect to forego any right that transaction might give me. Yes, if there was anything in the transaction that was lawfully mine I expected to have it. Yes, Dunbar represented that something might come out of it. He said, "Some day it may amount to something." Expected that if it did I [134—27] would have the benefit. Supposed it was all right or Dunbar would not have asked me to sign. believe there were four or five in the office at the time, but can't say who. I believe Dunbar brought in four or five men with him. Yes, it was all open and aboveboard.

Redirect Examination.

Heard nothing about this power of attorney until about three months ago Mr. Love wrote me that the Government was looking it up and that I might try to refresh my memory. Don't know McMurtry

(Testimony of Bert S. Denison.)

and have never since talked with Dunbar or any other of my associates about it. Have never claimed any interest in the Missouri claim located January 1, 1909.

Recross-examination.

No, never heard of the Missouri claim. Yes, if it had in fact been located lawfully under this power of attorney I would have expected to get the benefit of it in accordance with my original understanding, [135—28]

**Deposition of Guy A. Morningstar, for Plaintiff.**

GUY A. MORNINGSTAR, called by plaintiff April 6, 1917, testified by deposition as follows:

Reside in Chicago, and am employed by Cochran & Hanniberry, at the Union Stockyards. In December, 1903, was doing yard work for the Bowles Livestock Commission Company. W. R. Love was their bookkeeper, and I knew him. Have a faint recollection of signing that paper (Plaintiff's Exhibit 8). No, I had no intention of spending any money in the development of oil lands or gold mining lands, and didn't figure on getting any reward for signing that power of attorney. Didn't hear any more about this until Mr. Favorite called on me about six weeks ago. Never claimed any interest in the lands described, which my name was used to locate.

Cross-examination.

Don't pretend to remember all that was said when I signed. All I remember is just what I said there, might realize something out of it some day.

(Deposition of Guy A. Morningstar.)

Yes, I formerly testified: "It seems as though Dunbar—well, at that time Dunbar was working with the same concern, and he was looking for some of them to sign some papers, and they brought them in the office there, and an argument came up in regard to why we should sign them; and somebody said, "Well, it won't cost anything to sign them, go ahead.' And I sit down and give my name." And that the only purpose I had in signing was "nothing more than I supposed if anything came out of it I would expect my divvy out of it." I have testified to about the same thing here, only in different words. Yes, the supposition is that I read that paper, but there is nothing positive about it. Most of the boys working for the concern were there when I signed, and apparently all signed at the same time. No, I didn't intend to lend my name to defraud anybody. Evidently I gave McMurtry a power of attorney. At the time I gave it I didn't intend to spend any money, but any sane man [136—29] would be willing to spend some money, a few dollars, if he was going to get rich out of it. I never had any communication with McMurtry to my knowledge since the conversation that I might have had in the office, if I signed that power of attorney. [137—30]

**Deposition of Bernard M. O'Neill, for Plaintiff.**

BERNARD M. O'NEILL, called by plaintiff April 6, 1917, testified by deposition as follows:

Reside at 419 East 45th Street, Chicago. In De-

(Deposition of Bernard M. O'Neill.)

cember, 1903, was employed with the Union Stockyards & Transfer Company in the Exchange Building. Was acquainted with C. A. Dunbar and W. R. Love. Have a faint recollection of Love asking me to sign a paper of some kind as a matter of form. That is the way it was put to me. Could not say there was any explanation as to its purport or effect, or that anything was said about the locating of mining or oil lands. Signed it as a matter of friendship for Love. Don't think I knew L. B. McMurtry. The first direct information I ever had as to those lands located in my name is now, that the description of the lands has been read. Q. At the time you signed the paper for Mr. Love in 1903 what was your intention with respect to making locations upon public domains of the United States under the placer mining laws of the United States? A. Well, I take it, of course, this is just—that it was probably a matter of accommodating Love. If I would have any material interest in it I would read it. I don't recall that. It must have been a case of accommodation. No, I did not then have any intention of expending any money in the development of oil or other minerals upon the lands which would be located by the use of my name, nor have I ever claimed any interest in any of those locations named

Cross-examination.

No, I don't pretend to recall all that Love said when I signed that power of attorney, and wouldn't say I didn't read it. Yes, I usually read papers

(Deposition of John L. Bacon.)

before signing. It is likely Love explained that paper, but I don't remember it. [138—31]

**Deposition of John L. Bacon, for Plaintiff.**

JOHN L. BACON, called by plaintiff April 5, 1917, testified by deposition as follows:

Reside at 986 West 87th Street, Chicago. Am clerk for the Chicago, Burlington & Quincy Railway and was in December, 1903. Have no recollection of signing that power of attorney (Plaintiff's Exhibit 8). I know Mr. Love, the notary public; at that time he was employed with the Bowles Livestock Commission Company. Also knew Dunbar, who was with the same firm. Have no recollection of talking with Dunbar in December, 1903, about signing any such paper or appearing before Love. The first I was apprised that the name appeared on such instrument was when Mr. Favorite called on me last summer. Afterwards I went to San Francisco as a witness. Have been employed in the Burlington offices since 1896, and never knew of any other J. L. Bacon out there or in the Exchange Building. Mr. Love has tried to recall this matter to me but I couldn't bring anything to my mind that refreshed it.

Cross-examination.

My place of business in 1903 was in the Exchange Building, Union Stockyards. I had at least a speaking acquaintance with Mr. Love and knew he was a notary public. As I recall it I signed his requisition to act as notary; and never heard his

(Deposition of John L. Bacon.)

official integrity questioned. Am 42 years of age. Knew some of the men around the building and yards there at that time, especially Hokan Roll. Was with him a good deal during the day and evening. He came in at the time Favorite was interviewing me, about August last year. His name was also on the list Favorite showed me. Heard some of these men discussing the matter of signing a power of attorney but didn't take particular interest in such conversation. Never talked with Dunbar about this that I recollect. Yes, it is possible that I signed the paper and forgot it. Am positive I never lent my name to anybody for the purpose of aiding or assisting them in their own names or for their own benefit to acquire any land from the Government. [139—32]

**Deposition of Frank B. Blackman, for Plaintiff.**

FRANK B. BLACKMAN, called by plaintiff April 9, 1917, testified by deposition as follows:

Reside at 46 Semicir Street, Pittsburg, Pa., and am a livestock man. In December, 1903, was with the Bowles Livestock Commission Company, Exchange Building, Union Stockyards, Chicago, and was then acquainted with C. A. Dunbar, W. R. Love. Was head yardman and practically over both of them. Have no recollection of executing that power of attorney (Plaintiff's Exhibit 9) or of any transaction or business of that kind. If I signed anything of the sort it might have been put to me in some other light, and through my confidence in Love might have signed it, but have no

(Deposition of Frank B. Blackman.)

recollection of having any interest in anything of that kind. Was in the office with Love and know of no other Blackman around me. [140—33]

**Deposition of Hokan Roll, for Plaintiff.**

HOKAN ROLL, called by plaintiff April 4, 1917, testified by deposition as follows:

I reside in Chicago. Am in the livestock commission business. Resided in Chicago in December, 1903, and was then employed by the Chicago, Burlington & Quincy Railroad, in the Exchange Building, Union Stockyards. Have no recollection of signing that power of attorney (Plaintiff's Exhibit 8). First learned that the name appeared upon such a paper when Mr. Favorite called on me last summer. Can't say whether I knew C. A. Dunbar at that time and have no recollection of talking with him about executing such an instrument. Apparently L. B. McMurtry was my agent and attorney in fact to locate oil lands, but I never claimed any interest in any such lands or intended to acquire any, or apply for a United States patent for the lands described as having been located in such name.

Cross-examination.

Am in the same building now that I was in in December, 1903. Didn't know that Mr. Love had an office in that building—that I remember. Yes, I know him. If he says he saw me sign that paper and took my acknowledgment to it I would say I say I think he was mistaken, that I don't believe I

(Deposition of Hokan Roll.)

signed it. I am as positive about this as a man can be about anything. Am forty-one years of age. Can't say that I have talked with Love about this. It was brought to my attention by there being so many at the yards who were reported to have signed it and we naturally talked about it to a certain extent, not a great deal. I didn't take any particular interest in it for a long while because I didn't interest myself particularly. I felt confident in my own mind, it was a fraud, so far as I was concerned, that I had no recollection of it, having given anyone a power of attorney to act for me, to file lands for me. I was positive that I had not, didn't interest me further than that I knew it [141—34] was a skin so far as I was concerned, or felt confident it was such; and didn't give it much attention. At that time I didn't know Mr. Love or Dunbar was connected with it. Yes, I believe still it is a fraud; I don't believe I signed it. Mr. Favorite was the first to call my attention to this matter. He mentioned several names, parties who was supposed to have gone in, and I knew some of them. Yes, I knew C. A. Dunbar in connection with the Exchange Building, but am not sure that I knew him in 1903. Presume that I did. Have no recollection of his talking to me about these matters. Yes, have talked to him about this. [142—35]

**Deposition of Harry Hagenbuck, for Plaintiff.**

HARRY HAGENBUCK, called by plaintiff April 4, 1917, testified by deposition as follows:

I reside at 9647 South Seeley Avenue, Chicago; have lived in Chicago about 23 years. Am in the anti-hog cholera serum business. In December, 1903, was manager for Darlington & Company, live-stock brokers, at 143 Exchange Building, Union Stockyards. Have known C. A. Dunbar ever since he was in the yards, and know W. R. Love. Can't recollect signing that power of attorney (Plaintiff's Exhibit 8), and have no recollection of talking with Dunbar, Love or other persons with respect to signing such a paper. I first learned that the name appeared on such an instrument when investigator Favorite called last fall. My memory has not been refreshed since and I can't recall signing it. Before Favorite called I didn't know that the name Harry Hagenbuck with others appeared as a locator on certain described mining claims in California made January 1, 1907, and had never heard of it.

Cross-examination.

Yes, I mean that I have no personal recollection of signing that paper. Wouldn't say that I didn't. [143—36]

**Deposition of James Norton, for Plaintiff.**

JAMES NORTON, called by plaintiff April 6, 1917, testified by deposition as follows:

Was born in Chicago in 1867 and have always

(Deposition of James Norton.)

lived there. Am a cattle handler, with the Western Packing Company, Union Stockyards. Was employed in the same place in December, 1903, with Felcher, Peterson & Hess, and knew W. R. Love and C. A. Dunbar, both employed by the Bowles Livestock Commission Company, where I went to get orders. Don't remember signing that document (Plaintiff's Exhibit 9) or having a talk with anyone about signing such a paper. Have talked about it since I was subpoenaed, but my memory has not been refreshed, and I have no recollection of ever authorizing anyone to take up claims in my name. I usually sign my name James E.

Cross-examination.

No, I didn't testify that I didn't sign that power of attorney, I can't remember, nor do I mean to testify that Mr. Love or Mr. Dunbar didn't ask me to or tell me what it was. I don't remember. [144—37]

**Deposition of Joseph Norton, for Plaintiff.**

JOSEPH NORTON, called by plaintiff April 6, 1917, testified by deposition as follows:

Reside at 5438 Carpenter Street, Chicago, Ill. Am engaged in hauling crippled cattle at the Union Stockyards. Was in the same business in December, 1903, and knew W. R. Love and C. A. Dunbar, who were with the Bowles Livestock Commission Company, into which office I went occasionally. Well, if the address is there on that paper (Plaintiff's Exhibit 9), it must be me. I can't remember,

(Deposition of Joseph Norton.)

can't swear that I did sign it or that I didn't. Don't remember either Mr. Love or Mr. Dunbar talking to me about signing such an instrument. Never talked to anyone about signing such an instrument. Don't know L. B. McMurtry, and never had any communication with anyone about this matter. Have never claimed any interest in the lands in California described as having been located in the name of Joseph Norton. I have six brothers working in the yards there, of whom James is one. [145—38]

**Deposition of Thomas H. Lee, for Plaintiff.**

THOMAS H. LEE, called by plaintiff April 6, 1917, testified by deposition as follows:

Reside at 811 West 55th Street, or Garfield Boulevard, Chicago. Was living there in December, 1903, and working for the Chicago, Burlington & Quincy Railroad Company, in the Exchange Building at the Union Stockyards. Don't remember signing that power of attorney (Plaintiff's Exhibit 8). Wasn't acquainted with Love, Dunbar or McMurtry. No, in December, 1903, I had no intention of filing upon public lands, and don't remember of ever learning that my name or the name of Thomas H. Lee was used in making locations on oil lands in California. I know another Thomas Lee, who was working in the Exchange Building. He was a commission man. [146—39]

**Deposition of William Joseph Husbands, for Plaintiff.**

WILLIAM JOSEPH HUSBANDS, called by plaintiff April 5, 1917, testified by deposition as follows:

Reside at 4800 Shields Avenue, Chicago. Am secretary and treasurer of the Coal Teamsters Union. In 1903 was living in Chicago. Was then driving a coal wagon and went to the Exchange Building in the stockyards. Don't remember going before W. R. Love, notary public, in the office of the Bowles Livestock Commission Company, in December, 1903, and executing a power of attorney or any other paper. Don't know W. R. Love, L. A. Chadburn, C. A. Dunbar or L. B. McMurtry, and never knew of executing any paper before a notary public relative to oil lands.

Cross-examination.

Was in the Union Stockyards during the summer of 1903, but not during that winter. I never was in the office of the Bowles Livestock Commission Company. [147—40]

**Deposition of Victor G. Cranston, for Plaintiff.**

VICTOR G. CRANSTON, called by plaintiff April 6, 1917, testified by deposition as follows:

Reside at 857 West Garfield Boulevard, Chicago, Illinois, and am manager of the Stockyards Clearing-house. In December, 1903, I was a bill distributer, distributed weigh tickets on orders, and

(Deposition of Victor G. Cranston.)

knew W. R. Love of the Bowles Livestock Commission Company, in which office I would visit possibly twice an hour. Also knew C. A. Dunbar at that time. No, I have no direct recollection of signing that power of attorney (Plaintiff's Exhibit 9). Have talked with Love and Dunbar and tried to recall it, but can't. Have been well acquainted in the stockyards for the last 27 years and never knew any other Victor G. Cranston there, or T. G. or F. G. Cranston. No, I never claimed any interest in the lands located in the name of V. G. Cranston in California as described, or had any intention concerning them.

Cross-examination.

Wouldn't swear I didn't sign that paper, but have forgotten it if I did. Never met McMurtry that I know of, or Shadburn and never heard the name McMurtry mentioned until Mr. Favorite interviewed me.

Mr. HALL.—Let the record show that it is stipulated that W. H. Mahoney is now dead; that the Government's best knowledge is that Jones, Converse, Nicholls [Nichals], and Johns are dead; and that every possible effort has been made to locate Gorman, Price (Pierce), Dalbers, Ryan, Crowley (Rowley), Sterling and Hunt (Plaintiff's Exhibits 8 and 9). [148—41]

**Deposition of Frank B. Chapman, for Plaintiff.**

FRANK B. CHAPMAN, called April 16, 1917, on behalf of plaintiff, testified by deposition as follows:

I reside at No. 650 Westfield Avenue, Elizabeth, New Jersey. Am and have been for the last five and one-half years salesman for the Bryant Electrical Company of Bridgeport, Connecticut. In December, 1907, resided in the City of New York, and was salesman for the Machado & Roller Company of 203 Broadway, New York, makers of electrical instruments. Met L. B. McMurtry at his office on Broadway in some oil building, the exact location of which I don't remember. Met him at the time I signed the paper. I am the one that signed that paper (Plaintiff's Exhibit 5), but I cannot recall all the contents; it was through the request of Mr. Freeman, whom I had known for a year or so previous to that time.

Do not recall that I talked to anyone else about it. He said that Mr. McMurtry was here from California, a big oil man, and was interested in locating some oil lands or something of that sort, and he had agreed to help him out as he was acquainted a great deal in New York City, and my being a friend of his, he [149—42] thought that possibly I would not hesitate to do it, and I told him I would not, if it would do him any good, and there was no financial obligation, and so I signed it. Was not then or now familiar with the public land laws with respect to locating and acquiring title to public

(Deposition of Frank B. Chapman.)

lands. Don't recall that any explanation was made to me at that time by any person as to what rights I had under the mining laws of the United States.

Q. What was your purpose in signing this paper?

A. As a favor to Mr. Freeman.

Q. Did you have any other purpose?

A. Absolutely none.

Q. At that time did you intend to permit the use of your name in the making of locations upon public oil lands under the mining laws of the United States, with an intention of developing the lands and complying with the public land laws, and securing a patent from the United States to such lands?

A. No, sir.

Q. At the time you executed this power of attorney, did you have any purpose of aiding anyone in securing any title to any public oil lands in the United States?

A. No, sir. Of course, this paper was signed, what anyone could do with the paper—of course, I signed the paper, and did it, of course, knowingly, and I was in my right mind probably, but as far as giving it any thought, as to what the consequences would be, I forgot it.

Q. Did you intend at that time to expend any of your own money, or means in the development of any oil lands? A. No, sir. [150—43]

Q. The record of Kern County, California, discloses that on January 1, 1909, acting under the power of attorney dated December 21, 1907, L. B. McMurtry, as attorney in fact for yourself and

(Deposition of Frank B. Chapman.)

seven others, located the following placer mining claims, under the general mining laws of the United States, to wit:

"Minnesota," embracing the northeast quarter of section 34;

"Massachusetts," embracing the southeast quarter of section 20;

"New Jersey," embracing the southeast quarter of section 22;

"Virginia," embracing the southeast quarter of section 26; in Township 31, south; range 23, east, in Kern County, California, and eighteen others.

When, if at all, did you first learn that you, Frank B. Chapman, had been made one of the co-locators in each of those placer mining locations that I have designated?

A. I do not recall; I do not recall any of these names.

Q. When, after you signed this power of attorney, in December, 1907, did you again hear from this transaction?

A. I don't know whether it was through a letter from Mr. Freeman, or whether I saw Mr. Freeman again or not; I do not recall.

Q. Do you remember of the signing of any other paper by you after you signed the power of attorney in 1903?

A. I think I signed two proxies, papers at different times.

(Photographic copies of two proxies are here

(Deposition of Frank B. Chapman.)

offered in evidence as Plaintiff's Exhibits 1 and 2, respectively.)

My name appearing on each of these exhibits looks like a copy of my signature. [151—44]

Q. Who presented those papers to you, if anyone, for executions? A. I cannot tell you that.

(Said Exhibit 1 reads as follows:)

**Government's Exhibit No. 1.**

I, the undersigned, do hereby acknowledge that that certain power of attorney of date the 18th day of December, 1907 and recorded in Book 10 of Powers of Attorney at page 21, Records of Kern County, State of California, by me together with seven others executed to L. B. McMurtry is and at all times since said date has been in full force and effect and has never been revoked or modified; and I do hereby ratify, approve and confirm those certain contracts of sale made for me and in my name by L. B. McMurtry as my said attorney in fact with W. F. Herrin et al. of date the 4th day of August, 1910, and all contracts, agreements, deeds and conveyances made by my said attorney for me and in my name of and concerning said contract of sale and sale, and also all other contracts and transactions and acts made or done under said power of attorney by the said L. B. McMurtry.

WITNESS my hand and seal this 26th day of August, 1910.

(Sgd.) FRANK B. CHAPMAN,
L. S.

Witness:

(Sgd.) RUDOLPH LORECK.

State of New York,
County of Greene,—ss.

On this 26th day of August, in the year one thousand nine hundred and ten, before me, Rudolph Loreck, a Notary Public, in and for said ——— County, residing therein, duly commissioned and sworn, personally appeared Frank B. Chapman, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that—he—executed the same.

RUDOLPH LORECK.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal, at my office in the ——— County of Greene, State of New York, the day and year in this Certificate first above written.

[L. S.] RUDOLPH LORECK,
Notrary Public in and for the ——— County of Greene, State of New York.

My commission expires March 31, 1912. [152—45]

(Said Exhibit Two is the same in form as said Exhibit One, but purports to have been signed by the witness Frank B. Chapman on September 13, 1910, and acknowledged on the same date in Luzerne County, Pennsylvania, before W. L. Parsons, Notary Public.)

Don't remember receiving any money at the time I executed either Exhibit No. One or Exhibit No. Two. The first money I received for having signed this power of attorney in December, 1907, was in

(Deposition of Frank B. Chapman.)

1914, from Mr. Searls. I am not sure of his initials being F. H. As I recall it I received a check from him and he cashed it.

Q. I invite your attention, Mr. Chapman, to a check dated September 11, 1911, payable to the order of Frank B. Chapman, for the sum of two hundred and fifty dollars, signed F. H. Searls; it is endorsed on the back as follows:

"Received from L. B. McMurtry, Two Hundred and fifty dollars, in full payment for all my right, title and interest in and to all lands located by said L. B. McMurtry, on my behalf, in Kern County, California, pursuant to a power of attorney made by myself and others to said L. B. McMurtry, bearing date the 21st day of December, 1907,

"FRANK B. CHAPMAN.
"C. W. THORN.
"F. H. SEARLS."

Q. Is that your signature on the back of that check? A. Yes, sir.

Q. At the time that you received that check did you cash it yourself?

A. No, sir, I don't recall as I did.

Q. Will you please explain to us the circumstances under which that check was paid to you and what occurred at the time of its payment? [153—46]

I don't remember that check at all. I don't remember the two hundred and fifty dollars; I received five hundred dollars from him; I remember that.

Q. But that was another transaction, was it not?

A. That was in 1914.

(Deposition of Frank B. Chapman.)

Q. And did you receive any money whatever in 1911?

A. I do not recall that I ever received a cent but the five hundred dollars.

Don't remember having received two hundred and fifty dollars or any other sum by reason of having signed the endorsement on this check dated September 11, 1911. That looks like my signature on the back of that check of that date. Don't recall having any conference with Mr. Searls or Mr. Thorn about the date of that check.

Mr. HALL.—We desire to read in evidence the check, as follows, to wit:

"5th Ave. & 28th St.,

"No. 159

"New York, Sep. 11, 1911.

"SECOND NATIONAL BANK, A–63.

"Of the City of New York,

"Pay to the Order of Frank B. Chapman,

"Two Hundred and Fifty Dollars.

"$250.00/100.

"F. H. SEARLS."

Q. Did you ever receive any shares of stock in the Pacific Oil Company?

A. I received some shares of stock, but I would not say it was specifically the Pacific Oil Lands Company.

Mr. HALL.—Let the record show, Mr. Stenographer, [154—47] that, at my request, Mr. Barnn has promised the original stock book of the Pacific Oil Lands Company.

(Deposition of Frank B. Chapman.)

Q. I invite your attention, Mr. Chapman, to certificate No. 27 in the stock book of the Pacific Oil Lands Company, which purports, or certificates, rather, that Frank B. Chapman is the owner of 1000 shares of the capital stock of the Pacific Oil Lands Company; I further invite your attention to the transfer certificate on the back—is that your signature, Frank B. Chapman, to that certificate?

A. Yes, sir.

Q. When was it that this certificate No. 27 was delivered to you?

A. I do not recall; it was mailed to me. I cannot say positively from whom it was received.

Q. How long did you retain that certificate of stock?

A. Until Mr. Searls, I met him at the Knickerbocker Hotel and surrendered it when I received five hundred dollars, together with another stock. I don't recall what this other stock was but I think I had seventeen hundred and fifty shares altogether.

Q. To refresh your memory, I will ask you if that was not 750 shares of stock, if those were not shares of stocks in the Empire Oil & Development Company?

A. I cannot say as to the name; all I can recall is approximately—it seems to me like the Columbus Midway.

Q. What did you pay for this certificate No. 27, representing 1000 shares of stock in the Pacific Oil Lands Company?

(Deposition of Frank B. Chapman.)

A. My name on the power of attorney. I guess. [155—48]

I paid no cash for it. The first I learned that I was to receive those 1000 shares of stock was, as I recall, it was—Mr. Freeman called me up one day, and asked me to meet Mr. Murtry and two other gentlemen at the Knickerbocker Hotel, and it was during the conversation there at Mr. Murtry's room.

Q. Was this conference at the Knickerbocker Hotel with Mr. McMurtry and others before or after the date of this check for $250?

A. I cannot tell you that; I don't remember that; I cannot tell you; the dates would have to be approximate because I don't recall.

Q. Before you surrendered this certificate in the Pacific Oil Lands Company, had you received any other money? A. No, sir.

I never received any dividends from the stock in the Pacific Oil Lands Company. I don't recall ever having received a prospectus or circular from this company. I think I did, but I don't recall positively.

Q. I invite your attention to a check dated January 8th, 1914, numbered 1191, drawn on the Bank of California, National Association, San Farncisco, payable to the order of Frank B. Chapman, $20.00, and signed by the Pacific Oil Lands Company, F. E. Harrison, Secretary & Treasurer, and L. B. McMurtry, Vice-President; and it is endorsed on the back, F. B. Chapman. Is that your endorsement?

A. It looks like it.

Q. Will you examine that check and tell me

(Deposition of Frank B. Chapman.)

whether or not you ever received it?

A. I never saw—I don't recall of receiving it; I never got any money on it, that is certain.

Q. What do you say as to that signature, F. B. Chapman, there? [156—49] A. It looks real.

Mr. HALL.—We offer that check in evidence.

Q. When you surrendered this certificate No. 27 for 1000 shares in the Pacific Oil Lands Company, how was that money paid to you?

A. Although I would not state positively that the check was made out for $500, but I received five hundred dollars for it and I endorsed a statement on the back.

Q. Of the check?

A. Yes. I don't recall whether it was for $500 or $5,000, but I got a five hundred dollar bill, I got one five hundred dollar bill.

Q. And who handed that to you? A. Mr. Searls.

Mr. HALL.—Have you any check representing that transaction?

Mr. BRANN.—No ,I have no checks in that transaction at all in my possession, no part of it.

Mr. ACH.—Mr. Brann, while Mr. Hall has asked you that question, I will ask, have you any check of any kind other than these you have produced, checks of any kind?

Mr. BRANN.—To which I answer, no.

Mr. ACH.—Endorsed by Mr. Chapman in any way?

Mr. BRANN.—To which I answer, no. I was

(Deposition of Frank B. Chapman.)

trying to make omnibus answer covering all this matter.

Q. I invite your attention to an instrument which was executed at the State of New York, or in the State of New York, rather, in the County of Sullivan, on the 19th of August, 1913, before George H. Raum, a notary public. Is that your signature to that instrument? A. Yes, sir.

Q. Do you remember the circumstances under which that was executed?

A. Yes, I was on my vacation.

Mr. ACH.—Won't you identify the paper a little closer?

The WITNESS.—(Continuing.) I cannot do that, but I can identify [157—50] the signature. I don't recall—I did not read hardly any of these papers, as I recall. If any of these felllows asked me to sign anything, I signed it thoughtlessly, I believe, in a great many instances.

I think Mr. Thorn brought that paper for me to sign.

Q. Did you receive any money at the time you signed that paper? A. I don't remember of receiving a nickel. Q. Why did you execute that? A. Just because he asked me to, the same reason I signed the first paper.

Mr. HALL.—I offer this paper, and ask that it be marked and incorporated into the minutes at this time.

(Paper marked as Government's Exhibit 5 is as follows):

**Government's Exhibit No. 5.**

KNOW ALL MEN BY THESE PRESENTS, that I, the undersigned, have made, constituted and appointed and do by these presents make, constitute and appoint L. B. McMurtry, of the City of San Francisco, State of California, my true and lawful agent and attorney, to represent me at the annual meeting of the stockholders of PACIFIC OIL LANDS COMPANY, to be held in the City of San Francisco, State of California, on the 18th day of August, 1913, at ten o'clock in the forenoon, and at any other meeting or meetings of the stockholders of said corporation which may be held after the date hereof and up to and including the 31st day of December, 1913.

And I do hereby AUTHORIZE and EMPOWER said L. B. McMURTRY to vote as my proxy, for me and in my name, at any and all such meetings upon the stock now standing or which may then stand in my name on the books of said corporation and to do any other acts and things which I might do if personally present.

And I further hereby give and grant to my said attorney full power of substitution and revocation and hereby ratify and confirm any and all acts and things [158—51] which my said attorney or his substitute or substitutes may lawfully *to* by virtue thereof.

Witness my signature and seal, dated this 19th day of August, nineteen hundred thirteen, at the City of New York, State of New York.

Signed, sealed and delivered in the presence of:
(Sgd.) FRANK B. CHAPMAN. (Seal)
[Seal] (Sgd.) C. W. THORN.

State of New York,
County of Sullivan,—ss.

On this 19th day of August, in the year 1913, before me, George H. Raum, a Notary Public in and for the County of Sullivan, State of New York, personally appeared Frank B. Chapman, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged that he executed the same.

(Sgd.) GEORGE H. RAUM,
Notary Public, Sullivan County.

My commission expires on the 31st day of December, 1913.

My attention being called to a paper dated December 13, 1913, purporting to be a consent to the distribution of a dividend by the Pacific Oil Lands Company, I recall the signature, that it looks real.

Mr. HALL.—We offer this paper in evidence and ask that it be marked Government's Exhibit 6.

I don't remember who sent me that paper, or how I came to sign it.

(This paper is marked Government's Exhibit 6 and is as follows):

**Government's Exhibit No. 6.**

PACIFIC OIL LANDS COMPANY:

I, the undersigned, stockholder of the Pacific Oil Lands Company, a California corporation with its principal place of business in the City and County

(Deposition of Frank B. Chapman.)

of San Francisco, State of California, do hereby consent [159—52] that the Board of Directors of said corporation may set aside $20,000.00 of the cash assets of said corporation to be declared as a dividend upon the stock of said corporation, and such other sums from time to time as in their discretion may seem advisable; and I hereby release the Board of Directors of said corporation from all liability of every kind and character in so doing.

Dated: December 13th, 1913.

(Sgd.) FRANK B. CHAPMAN.

Q. Referring, now, Mr. Chapman, to Government's Exhibit 1 and Government's Exhibit 2, you will observe that both documents attempt to "ratify, approve and confirm those seven contracts of sale made for me and in my name by L. B. McMurtry, as my said attorney in fact with W. F. Herrin et al., of date the 4th day of August, 1910, and all contracts, agreements, deeds and conveyances, made by my said attorney for me and in my name, of and concerning said contract of sale, and sale, and also all other contracts and transations and acts made or done under said power of attorney by the said L. B. McMurtry." At the time you executed Exhibits 1 and 2, did you know the contents of these contracts with Herrin and others, bearing date August 4, 1910?

A. I don't recall that. Q. At that time, to wit, September 13, 1910, did you know how many locations of public oil lands had been made in the State of California by the use of your name?

(Deposition of Frank B. Chapman.)

A. Not that I remember. Q. Did you make inquiry of any person at that time as to how many locations your name had been used in making? A. No, sir. Q. Were you ever advised by anyone that on August 6th, 1910, Mr. L. B. McMurtry signed as attorney in fact for yourself and others, and entered into a supplemental agreement with W. F. Herrin and others, or with the Associated Oil Company, with respect to lands involved in these locations which [160—53] were made by the use of your name? A. I don't remember that I did. Q. Were you ever advised as to what sum or sums of money Mr. McMurtry received from W. F. Herrin and others, or from the Associated Oil Company, as a result of the execution of those contracts of August 4, 1910, and the supplemental agreement of August 6th, 1910?

A. No, sir. Q. What advice if any, have you received from any sources as to what moneys Mr. McMurtry or anyone else has received from the sale, lease, or any other disposition of any of the lands covered by locations on which your name was used as one of the locators?

A. I do not recall receiving any. Q. January 1, 1909, have you claimed in any of the lands covered by the locations to which I referred some time ago, namely, "Minnesota," "Massachusetts," "New Jersey," "Virginia," and eighteen others unnamed at present?

A. Knowingly I claimed none.

(Deposition of Frank B. Chapman.)

I do not know where any of these locations are or anything about them.

Q. Was there ever any portion, other than the five hundred dollars which was paid to you at the time you surrendered your certificate of stock in the Pacific Oil Lands Company, of the approximately $1,058,000, received by McMurtry from the Associated Oil Company, paid to you?

A. I never received anything but the five hundred dollars that I recall. [161—54]

Cross-examination by Mr. ACH.

Q. What do you mean, "I don't remember," "I don't recall"? A. That is what I mean, I don't; I paid so little attention to this whole affair that it absolutely passed from my mind. A great many things I have seen here, why, I must have been hypnotized.

A. Yes, I went to San Francisco as a witness in cases A–41, A–42 and A–43 in November, 1916. Went at the request of the Government's attorney. Don't recall having been interviewed by Mr. Williams or Mr. Williamson prior to going to San Francisco. Was interviewed by Mr. Hamel prior to going to San Francisco and signed the statement at that time. I think I told him the amount of money I had received was $500.00, and that I recalled signing two papers, two proxies. At the time of this interview with Mr. Hamel, these two proxies were the only papers I recalled having signed. When in San Francisco on these other cases think I was asked about these checks or money I had received,

(Deposition of Frank B. Chapman.)

and testified that I had received five hundred dollars. My recollection is that I then testified to receiving only one check, that for five hundred dollars. I don't recall positively having been asked at that time concerning the number of checks—my receipt of a check for $250.00 and one for $20.00. Have met Mr. McMurtry twice. First when I signed the power of attorney and the second time, I believe, was in the Knickerbocker Hotel. I don't recall ever having met J. B. Thickens. Don't know Major or Mr. Hoeppner. Have only heard of him. Signed this power of attorney at the request of Mr. Freeman. Had known him about a year before that. He was connected with an exhibition of mining instruments and tools, etc. I was an electrical engineer. He was employed by the mining exhibiting company and I met him at that time. Between the time I first met Mr. Freeman and the time I signed this power of attorney [162—55] I met him "possibly three or four times, just happened to met him on the street."

Q. You just casually met him? A. He came to the office, I think, once or twice, to see me. Q. On business, on account— A. No, in connection with nothing, only his own private affairs. Q. In what matter, in what particular? A. He wanted to borrow a dollar. Q. And other than borrowing some money from you, he had no relations with you at all, excepting a casual acquaintance which sprung up at the time of the mining exhibit; is that correct? A. Yes, sir. Q. And then upon one or two

(Deposition of Frank B. Chapman.)

occasions he came to see you, as I understand it, between those dates? A. Yes, sir. Q. And attempted to borrow some money from you? A. Yes, he was successful. Q. Did he repay you? A. I don't recall ever receiving any money from him. Q. What? A. No, sir.

It may have been a year or six months. I loaned him a dollar once or twice just as I would anyone, but did not consider him my debtor at the time I signed this power of attorney in Mr. McMurtry's office, although he had not repaid the money loaned him.

Q. Prior to your signing this power of attorney with him in Mr. McMurtry's office, the only relation you had with Mr. Freeman was that you had met him at this show casually, or upon the street once or twice, and then upon one or two occasions when he came to your office and asked you to lend him a dollar, and that is all? A. That is all there is to it.

At the time I met Freeman I was an electrical engineer with Rockwell & Bruce, No. 26 Cortlandt Street. Mr. Freeman was then employed by the mining show people soliciting space for the show and he would come in, when he came in, he would possibly pass the time of day, but I don't remember any particular visit. I never visited his house, and he never visited ine. I was a [163—56] salaried man at that time. I think I got twenty-five dollars a week and had no other means. I had no family at that time, and no obligations outside of my personal affairs. I never borrowed any money from

(Deposition of Frank B. Chapman.)

Mr. Freeman. At the time I signed this power of attorney my only resources was my salary of twenty-five dollars a week. Freeman first mentioned my signing this power of attorney the day I signed it. He called me on the phone and I went up to McMurtry's office on Broadway. I had never been in McMurtry's office before, and had never heard of him before. The first time recall Freeman ever saying anything to me about oil lands was there in McMurtry's office that day I signed the power of attorney. Up to that time the only business transaction of any kind or character I ever had with Freeman or McMurtry was the occasional loans I made to Freeman. I believe there were other people in McMurtry's office at the time I went there to sign this power of attorney and Freeman introduced me. I didn't notice particularly how many were there, and did not see any of the others sign their names, that I recall. I don't remember any of these people.

Q. Were you introduced to McMurtry at that time? A. I think when I left the building I was. Q. In that same room? A. No, I think it was in the hall, in front of the elevator. Q. Did anybody give you anything for signing that paper at that time? A. No, sir. Q. Did anybody promise you anything for signing? A. It was a sort of semi-promise; Mr. Freeman thought there might be a lot of money in it for me some day. Q. Why didn't you mention that on direct examination to-day when Mr. Hall asked you to tell what was said? A. He

(Deposition of Frank B. Chapman.)

asked me why I signed it, and I told him because Mr. Freeman asked me to, but he didn't ask me what Freeman said, I don't think. Q. Didn't he ask you whether you intended to put up any money, or get anything? [164—57] A. I think he asked me if I intended to, yes. Q. Why didn't you answer, why didn't you in answer to his question, then, when he asked you to tell the circumstances, what was said, why didn't you tell then that this man told you on that same day, that you might make a lot of money out of this thing? A. Why, I don't know; I don't think he asked for the conversation.

I remember Freeman's saying that we might get some money, a lot of money, or something like that. I presume he told me at that time something about Mr. McMurtry's capacity in the oil business, but I don't remember anything about the conversation.

Q. Well, why do you then think that you presume he did?

Q. Well, why do you then think that you presume he did?

A. Well, usually, if a fellow has anything, and he has an object, I presume he would enter into a sort of conversation by expressing any suggestions which might convince the one whom he wanted to do something for, that he thought it was all right. I presume—I don't recall just what he said to me, but I presume he told me all about it at the time; but I didn't pay any particular attention to that; but, as I have said before, I signed because Mr. Freeman asked me to sign it. Q. Is it true, as a

(Deposition of Frank B. Chapman.)

matter of fact, that Mr. Freeman did tell you that it was in connection with oil that he wanted your signature and the location of oil lands in California? A. It was in connection with oil lands, certainly. Q. And before you went up there and talked to him at all, did you know that Mr. Freeman had been engaged in any way in the oil business? A. I don't think I did; no, sir. Q. Then it was an entirely new subject matter when he opened it up there in Mr. McMurtry's office with you? A. So far as we were concerned, yes, sir. Q. And when he telephoned you to come up there, you did not have any idea of what he wanted, had you? [165—58] A. No, I don't remember whether he told me what he wanted me to do or not. He wanted me to come up there and see him, and he said he was located up there and he wanted me to come up there, there at the office. Q. Was there any talk at all about oil? A. Where, over the phone? Q. Yes. A. Why, he mentioned, I think, that he was with Mr. McMurtry; I don't remember whether he said anything about oil or not, until I got up there. Q. Has he been, so far as you know, engaged in any way in selling any stocks in oil companies? A. Not so far as I know. Q. And you had no reason then to, as the boy in the street would say, "Stall off," going up to see him about anything? A. No, I had nothing against the man. Q. And when he asked you to come up there and see the office, you thought it was simply to come up there, when you did go up there, and take a look around

(Deposition of Frank B. Chapman.)

the office that he was in? A. I had no especial interest in going up. Q. And there was never any talk about any oil stocks between you and Mr. Freeman, personally? A. No, sir. Q. You are reported as having said in answer to a question at page 82 of your former examination, in response to a question by Mr. Hall: "Q. Will you explain to the Court under what circumstances you executed that power of attorney? A. I knew a Mr. Freeman—I don't recall his initials—I think F. S. Q. F. H.? A. Or F. H., and I was in the office one day and he called me on the phone and I believe he said that he was connected with some oil company. I won't be sure. But he said, 'Come up and see me.' As I recall it, I said, 'I have not any more money for oil.' He said, 'Come up. I don't want you to buy any stock.' " Do you remember testifying to that in answer to Mr. Hall's question? A. Yes. I think I did. Q. And you did not remember it when I was interrogating you a few minutes ago? A. No, sir, not word for word, just casually. Q. Your mind is rather hazy and uncertain [166—59] about the whole thing, is it not? A. Some things, yes.

Yes, I was a little bit surprised to see my signature on the $250 check dated September, 1911, this morning. Yes, I think I would have testified positively that I had not put my name to such a check, if it had not been shown me. Yes, I was equally surprised when I saw the dividend twenty dollar check with my signature to it.

Q. And you would have testified positively and

(Deposition of Frank B. Chapman.)

without any reservation at all that you never put your name on the twenty-dollar check, which represented dividends in that matter, would you not? A. I would testify that I never received money on the check. Q. And would you not also have testified that you had never put your name on the twenty dollar check for dividends? A. Yes, sir; I believe I would.

I have not the letters which it has been mentioned that I received from Searls, Freeman, or somebody. I don't remember what I did with them—I threw them away. I might have written Mr. Searls, but I don't remember writing to Mr. Freeman. I kept no copies of any such letters—I don't remember of ever writing one. I don't recall sending these proxies and power of attorney and consent to a dividend to San Francisco. I believe I sent one to Thorn and the other, he came in person. I received this stock certificate No. 27. Am quite positive, through the mails. Cannot recall whether I returned the receipt through mail. Cannot say definitely when I received this stock certificate. Believe I signed my name on this stock certificate in the Knickerbocker Hotel in the presence of Mr. Searls, in 1914. Think I received this stock "two, three or four years" after signing the power of attorney.

Q. And where did you keep it meantime? A. I gave it to the present Mrs. Chapman. Q. When, please? A. At the time I got it, [167—60] when I received it. Q. She was not your wife at that

(Deposition of Frank B. Chapman.)

time? A. No, sir. My present salary is $300.00 a month. In 1914, at the time I put my signature on the back of the stock certificate my salary was $200.00 a month.

Q. Up to the time you put your signature upon the back of this piece of paper, you never had a dollar out of this thing? A. At that time I put my signature? Q. On certificate No. 27? A. Not that I recall, no, sir. Q. Let us not misunderstand. I understood you to say on your direct examination, and I understand you now to say, that it was not until after you signed the transfer of this stock at the Knickerbocker Hotel that you received any money at all in this transaction? A. Until I had handed that over, no, sir. Q. In other words, you disposed of this stock and got rid of it, and that was the first time you ever got a dollar from anybody on this transaction? A. Yes, sir. Q. And that is absolutely so, as you recall it? A. Yes, sir. Q. Have you any explanation to make as to why you put your name on the back of that check of September 11, 1911, for two hundred and fifty dollars. A. No, sir. Q. Have you any explanation to make as to what you did with the check for $20.00 after you put your name on it? A. No, sir. Q. Not the slightest recollection about it? A. I don't remember anything about either one of those checks.

Aside from talking about locating oil lands, I don't recall any of the conversation at McMurtry's office at the time I signed that power of attorney. Was there possibly ten minutes. Don't know why

(Deposition of Frank B. Chapman.)

Freeman picked on me to sign this power of attorney. Think he said that I came to his mind as one of those that he would like to let in on it, or something of that kind. [168—61] Don't believe he said anything about doing this as a kindness in return for the loans I had made him. He said I might get something out of it, but didn't say how, that I recall. He seemed very sincere and I think he thought he was giving me a good thing. He seemed to have a whole lot of confidence in the proposition that he was promoting. I don't remember asking him what he meant by the location of lands, or what location meant. Know I did not know. Presume I made inquiries of him, but would not swear that I did. Don't recall that I asked him what a location meant.

Q. I have before me your answer at page 82 to the same question that I read you a little while ago, in which Mr. Hall asked you to explain the circumstances under which you executed the power of attorney, and I will now read further in that answer, immediately following the excerpt that I read before to you, and we have you reported as follows:

> "So I went up and met Mr. Freeman and looked around the office, and while I was there I told him that I was in a hurry; and he asked me to sign this paper, which I assume is a power of attorney. I asked him what it was; that I did not have time to read it particularly; and he said, 'Well, there is a Mr. McMurtry from the west. He is a big oil man. I know

(Deposition of Frank B. Chapman.)

some people around New York, and he is a practical stranger, and I have agreed to get a certain number of names for him as locators.' I said, 'What does locators mean?' and he painted it in a rather flowery way, and he says, 'You might get a lot of money out of it some time.' I said, 'All right; if I can sign this paper and it is not going to get me into serious difficulty and don't cost me anything, I will sign it.' And did sign it." [169—62]

Do you remember testifying to that? A. Yes, sir. Q. And by reading this, does it recall to your memory that you did ask him what locators meant? A. I don't think in my testimony here I said—Q. Well, go on. A. I said I did not recall it. Q. Now, please answer my question: Does my reading this transcript of your testimony, or excerpt from the transcript of your testimony now refresh your memory to the extent that you can say positively that you did ask him, as you testified before, "What does locators mean?" A. Yes, sir, I would say my testimony is right. Q. I am not asking you about that. I am asking you, do you now remember that you asked him the question, "What does locators mean?" A. Practically the same thing, yes, sir. Q. Did you remember that you did ask him that question at the time you testified in San Francisco, in November, 1916? A. Yes.

I do not recall what answer he made to this question.

Q. Outside of painting the thing to you in a very

(Deposition of Frank B. Chapman.)

flowery manner, and telling you that you might make a lot of money out of it, what did he tell you, or anybody tell you what was meant by locating lands in California under that power of attorney? A. Why, as I recall it, he said something about a locator, in order to get a patent or something, he had to have so many locators' names, and that if he could get the locators' names he could go on and locate lands and work out the assessments, or something of that kind, or words to that effect—I don't know.

Think I met McMurtry as I was going out after having signed the power of attorney.

Q. And didn't he also tell you in substance, substantially to this effect, in a general way, that Mr. McMurtry was a man who knew California, knew where oil lands were; that he was going out there again and he was going to devote himself to a search for oil [170—63] lands belonging to the Government, and that having the right of each citizen to locate lands, that he wanted to be equipped so that he could locate lands in California, if he found them, and that the locators secured here in New York would be advised sooner or later whether he located any lands in their names or not—any conversation to that effect? A. Why, not that I recall, words to that effect, possibly. This is ten or eleven years ago.

I cannot say what the conversation was, but it was in that—anyway it was in that connection—I don't know. No, I was not trying at that time to aid or

(Deposition of Frank B. Chapman.)

assist McMurtry or Freeman to commit a fraud upon the Government and get more land than an individual was entitled to under the laws.

Q. You do recall that he said to you that you and all other individuals in the United States, had a right to locate public lands, do assessment work upon the lands, and after discovery of oil, get a patent from the Government; you remember that? A. Yes. Q. Now, you did not understand, did you, that you were going to make money out of this thing, as he painted it, simply by signing your name, did you? A. No, sir. Q. And you expected that in the event that anything came out of this man acting as your agent, and using your name, you expected to be advised of it, didn't you? A. I don't think I gave it any thought.

No, I had no arrangement or contract with Freeman or McMurtry that I would be advised of it that I recall. No, I had no arrangement with Freeman whereby he would go down in his pocket and pay for the assessment work that was required under the law in the event that he located any lands for me in California. No, I had no such arrangement with anyone. No, there was no understanding or agreement of any kind or character between myself and McMurtry when I left that place. Yes, the entire conversation [171—64] that occurred there was between Freeman and myself and those other gentlemen, until I met Mr. McMurtry in a casual way, that is all.

Q. Well, can you tell what passed between your-

(Deposition of Frank B. Chapman.)

self and McMurtry after you signed the power? A. Mighty few words.

Mr. Freeman introduced me as an electrical engineer and he said, as I recall it, Mr. McMurtry, Mr. Chapman is a good man for us, because he is an electrical engineer, and we might have occasion to use him in California some time. Mr. McMurtry shook hands and said "That is good," or something like that, and took the elevator.

Q. I suppose there was more or less desultory talk about a great amount of oil being found out there in California, great gushers, and selling land at two dollars and a half? A. I always heard more or less about oil lands and gold mines. Q. And you regarded this step as the initial step in the ladder of getting rich in life, didn't you? A. No, sir, not at all. Q. You did not think that he was lying to you entirely, did you, when he painted it in a flowery way, as the great big money you would get out of it some time, did you? A. I never expected to get a dollar out of it. Q. No matter about that. A. He might have. Q. But you, yourself, thought it might be among the range of possibilities that you might by reason of some lands he might locate in your name? A. No, sir. Q. And you thought you were doing an absolutely idle and vain act, at that time? A. I did as far as any moneys or profits coming to me. Q. It was then simply a lack of confidence on your part in the picture which he painted? A. Yes, sir. Q. You don't mean to be understood as saying that if he located lands in your name, reported it to

(Deposition of Frank B. Chapman.)

you [172—65] and told you that he had done assessment work out there, and borrowed money upon the lands to drill wells, well, say to the extent of ten thousand dollars, and that he had gotten an oil well upon 160 acres of that land, and that he had had an offer of one million and a half dollars for that land, but in order to get the million and a half you would have to apply for a patent and pay the Government two dollars and a half an acre that you would not have put up your money, do you? A. I would have investigated before I would have expended any large sums of money. Q. And if you had found out it was true, would you have put up your share and gotten the land? A. If it was possible, and thoroughly legal, legally possible, possibly I would, yes, sir. Q. You would not have said to Mr. Freeman, well, you are entitled to my share of this million and a half, would you? A. I might have done so upon investigation that it was not what I thought it ought to be. Q. In other words, you would have felt no obligation or under those circumstances Mr. Freeman could have your share of the million and a half. A. You would understand that I would have a thought that I had no money invested in this proposition.

I presume I read this power of attorney before signing it and understood that I was giving him the right to locate in my name under the laws of the United States, either mineral or oil lands.

Q. Now, this power of attorney goes on and further gives him authority to grant, bargain, to sell,

(Deposition of Frank B. Chapman.)

assign, lease, pledge, mortgage, deed, any part or all of such mining claim or claims, and to execute and deliver any contract or contracts of sale, deed or deeds conveying any part of your interest in and to any such mining claim or claims as might be acquired here in any part of the United States of America, and giving him full power of authority, [173—66] and with full power of substitution. Now, when you read that, if you did read it at that time, you also recognized the fact that you were giving him the right to sell, assign and mortgage these properties which he might locate for you and in your name; do you remember that fact? A. Well, I don't remember what really the paper was; I cannot recall that.

Having heard it read it does not come back to my mind; not a thing, absolutely. I certainly don't recall what it was. Yes, I was in business for myself before signing this power of attorney; was interested in an officer in an electrical business doing a considerable business throughout the country. Yes, the firm occasionally signed checks, promissory notes, and contracts and specifications and things of that kind. Yes, I would frequently, as officer of this company, sign the firm's name to checks, notes, contracts, specifications and such things. Yes, I would always read them over and always knew what I was signing. Yes, I understood there was some responsibility to a man's signature to every document that he signed, and knew this when I signed the power of attorney. Knew that I would be

(Deposition of Frank B. Chapman.)

bound by my signature. I think the first that I knew of anything having been done under this power of attorney was when I received the stock. Received this through the mail. Yes, I am quite positive I received it through the mail, but I would not state positively, but I think that is right.

Q. Are you not positive that the next thing you heard about the matter, after signing the power of attorney, was when you received the stock? A. I may have gotten a letter from Mr. Thorn, or Mr. Freeman, but I think I got a letter from Freeman, I believe it was before I received the stock.

I was then at Cumberland, Maryland. Don't know where the [174—67] letter is. Don't remember what it said or anything about the language in it. I should say this was two or three years after the signing of the power of attorney. I don't think it was as much as four years, it was before I got the stock. Am quite sure it was not within a year and a half after signing the power of attorney. As well as I recall, that was the first I had heard of this matter after signing the power of attorney. No, I have not been ill since signing this power of attorney and have not noticed that my memory has been affected in ordinary affairs. The only way I can account for failure to remember my signature on these two checks is that "I don't remember it and that is all." Yes, I am quite positive that the first time I heard anything about this transaction after signing the power of attorney was

(Deposition of Frank B. Chapman.)

when I got a letter from Mr. Freeman, in Cumberland, Maryland.

Q. Now, just look at the dates of this ratification or these ratifications in front of you, and tell us about them? A. This is in 1910. Q. Yes, I know that; but I say, how did you hear about this? A. I don't remember. Q. Did you receive the letter from Freeman before you signed these ratifications? A. I believe so; yes, sir. Q. Then when you got the ratification, you had already had some kind of report from Freeman as to the transaction in California? A. I don't remember as to that.

This letter had no reference to those ratifications. Yes, at the time I signed those ratifications I had received this communication from Freeman concerning the California enterprise.

Q. Well, now, after you got that communication and before you signed those papers, was there any hope or promise or suggestion made that this thing you did not regard as anything at all when you signed your name, might develop into something? A. Yes, I think that was in Mr. Freeman's letter. Q. Well, what was in the [175—68] letter? A. He referred to the paper I signed and said—I don't recall just what he said—he referred to the paper I signed, that it looked pretty good; they had—I don't recall what it said, but it might be a good thing, and I signed it, or something of that kind; things looked good out there, or something to that effect.

He may have mentioned McMurtry, but I

(Deposition of Frank B. Chapman.)

don't recall. Nor do I recall his mentioning that McMurtry was locating oil lands with the powers of attorney. No, I did not write him for further details; paid no attention to it. I was travelling at that time for the National Carbon Company and think I was getting eighteen hundred dollars a year. No, I hadn't made any money in stock speculation or otherwise than just my salary between 1907 and that date. All I had was what I had saved out of my salary. No, I was not in debt. I can't say how much I had at that time. Yes, I presume I had as much as $2,500. Don't think I had more than that.

Q. Now, this letter, then, of Freeman's, did you regard that at that time as an encouraging letter to you, to spur you on, for you to go on, or did you regard it as an expression of a view, based upon information which he had from McMurtry, directly or indirectly, concerning these oil land locations in California; do you understand the question? A. Yes, sir. As I said before, I had absolutely no confidence in it, but I do not think I gave the thing any thought. Q. But when you got this letter—just kindly heed the question, and the reporter will again read it to you. Q. (Question read.) A. Why, I presume it was a letter to spur me on, if that is the way you want to put it; but it didn't spur me, if that is what you want to know. Q. You didn't need any spur? A. No, sir, not in that direction. Q. What did he know about your circumstances at that time that would cause him to write

(Deposition of Frank B. Chapman.)

a letter to you, simply to spur you on in your enterprise? [176—69] A. I don't know whether he felt under obligations to me in any way or not, I don't know. Q. You don't think he was lying to you wilfully or deliberately? A. Probably he thought I would be interested in it as he was. Q. You are reported in the other case as having said in answer to questions from Mr. Hall, at page 84:

> "Q. After you signed it, when did you next hear from it or anything about it?
>
> "A. I won't be sure about that. It seems to me, though, as near as I can recall—well, I won't say that, because I think,—well it was about two years, I should say, afterwards, as I recall it.
>
> "Q. What was that communication, or what did you hear in regard to it?
>
> "A. I got a letter from Mr. Freeman. I was then in Cumberland, Maryland, on the road, and I think he said at that time that he had seen Mr. McMurtry, and he says, 'You recall the paper you signed. It looks just as though we are all going to be rich some day.' That was all there was to it, I did not reply to the letter."

Do you remember that now? A. I think I remember the testimony, yes, sir. Q. Do you remember that? A. Yes, sir. Q. Was that true, is that what he said in the letter? A. I believe it was, substantially, that. Q. You didn't remember that when I interrogated you to-day, that you had used

(Deposition of Frank B. Chapman.)

the phrase that he said it looks as though we are all going to be rich some day. You didn't think it went that strong, did you? A. I believe he painted it flowery, as I said before. Q. I am not talking about his painting it flowery, but about this letter and your recollection, [177—70] and memory. You didn't remember that when I interrogated you, when I asked you to tell me—A. Well, words to that effect. Q. You didn't remember that? A. Not exactly; no, sir. Q. Now, that I have read the record to you, do you remember that substantially, that language was in the letter? A. I would say words to that effect, yes, sir.

Q. If you will permit me, Mr. Chapman, I will call your attention to Government's Exhibit No. 1, and I am going to read it to you, as Mr. Hall did, and at the time he was reading it you read it, didn't you? Follow this. A. Yes, sir. Q. Do you know what is understood, what the paper is without reading it again? A. I cannot say word for word. Q. Does it mention these powers of attorney? A. Yes, sir, I think so. Q. In what manner does it mention it, what does it say? A. I cannot say as to that. Q. Does it mention any contract concerning located lands? A. I think it does. Q. Does it give the date of any contract? A. I cannot be sure of that. Q. Does it give the name of anybody with whom it is understood any contract was made? A. I don't remember that. Q. In what manner does it refer to any contract, have you any recollection at all? A. No, I was looking mostly at my signature

(Deposition of Frank B. Chapman.)

when Mr. Hall showed it to me. Q. But you did read that, and you heard him read it? A. Yes, sir. Q. Won't you please tell me, if you can, what reference it makes to the contract referred to in the instrument itself? A. I cannot tell you. Q. What is the general purpose of the instrument, do you know? A. No, I would not say definitely. Q. All right. Now, at the time that you signed it, you were in Greene County—you know Greene County, don't you? A. I know where it is, yes. Q. What towns in Greene County were you making in the year 1910, in August or September? A. I was on my vacation. Q. Oh! Then [178—71] you remember that you were in Greene County on your vacation in 1910? A. Yes, sir, I was. Q. Where were you? A. Platts Cove. Q. And while you were there you found a notary, did you, by the name of Rudolph Loreck, or something of that kind? A. I don't recall his name. Q. But you recall going to a notary public with the original piece of paper? A. Yes, sir. Q. Was anybody with you? A. No, sir. Q. How did you receive the original while you were at Platts Cove, or did you carry it there with you? A. I received it by mail. *A.* From whom? A. I think Mr. Thorn. Q. C. W. Thorn? A. Yes, sir, I think so. Q. Then you must have received a letter with it? A. I presume so. Q. Do you remember it? A. Yes, sir. Q. Where is that letter? A. I don't know. Q. Do you think you have got it? A. I know I have not got it. Q. Then you know it is destroyed? A. Yes, sir. Q. What was in the letter? A. I cannot state posi-

(Deposition of Frank B. Chapman.)

tively, but something about a proxy he would have me get back to him as they had to get it to California by a certain time. Q. Was anything said in the letter about enclosing you any paper that you should sign before a notary public, and acknowledge, and send it back to anybody? A. I believe so; I believe I sent it back to him. Q. Did you or did you not send it back to San Francisco? A. I don't remember. Q. Was anything said in the letter about the proxy and as to who was to have this proxy? A. I think he mentioned Mr. McMurtry's name. Q. And it was that Mr. McMurtry was to vote the stock; is that it? A. Yes, sir. Q. And that is the stock that stood in your name; is that right? A. I don't know whether it was to vote the stock, but he was to be the proxy, to vote his locator, or something of that kind. Q. Well, then, when you got this letter in 1910, at Platts Cove, you had already heard from [179—72] Mr. Freeman to the effect that it looked as though you were all going to get rich out of this thing? A. I am quite sure it was previous.

This communication from Mr. Thorn was the second one that I had concerning this matter after signing the power of attorney. Think I met Thorn in New York at the Knickerbocker Hotel at the same time I met McMurtry, or the second time. I can't say just when I did meet Thorn. I think I received this paper, Government's Exhibit No. 1 by mail. Am quite sure of that and think I received it from Mr. Thorn and must have met him before that. I can't say when. I met him down town with Mr.

(Deposition of Frank B. Chapman.)

Freeman but I can't tell where or what time. In this letter enclosing this particular paper, Government's Exhibit 1, as near as I can remember, Mr. Thorn "wished me to sign this proxy and get it back to him as soon as possible, because Mr. McMurtry wanted to use it on or before a certain date." I would not say positively whether I read it over. Yes, I knew what it was. I presume I read it; I must have read it, but cannot say what was in it. I know it was a proxy and as soon as I saw it I signed it and sent it on.

Q. I will read it to you. (Proxy read.) Do you understand the last portion of that paper which I have just read to you? A. Well, the whole thing is not clear, no, sir. Q. You understood when I read this paper to you, that you were ratifying the power of attorney which you had before given to Mr. McMurtry, didn't you? A. I presume I did, yes, sir. Q. And you understand English well enough to know what you were putting your signature over a paper which declared that that power of attorney was in full force and had never been revoked or modified by you, didn't you? A. I didn't give it that much thought. [180—73]

I don't believe I read it thoroughly. I won't say whether I did or not. I don't remember to whom I returned this proxy but think I returned it to Mr. Thorn. May have sent it to San Francisco. That is my signature on Exhibit No. 2, which is the same as Exhibit No. 1—the same as Government's Exhibit 1, with the exception of the date. I have no posi-

(Deposition of Frank B. Chapman.)

tive recollection as to when or where I signed Exhibit 2.

Q. Explain, if you can, why it is that two documents, reading exactly the same, with the exception of the dates, were signed by you? A. I signed anything I was asked to; when I signed the first one—I signed anything they thought I was to give. Q. Who asked you to sign the second one? A. I cannot recall.

Don't remember how long I kept the second paper before signing or where I signed it. Believe I signed one at Kenosa Lake, New York. My attention being called to the fact that this Exhibit 2 was acknowledged in Luzerne County, Pennsylvania, I will say that I was at Wilkes-Barre, Pennsylvania, which I think is in Luzerne County. I don't remember going before a notary then. Am confused on that point. I signed it and must have gotten it, but don't remember how I got it. I thought so little about the thing, I don't remember what I signed. Between the dates of the signing of these two papers, I first recall having seen Freeman or receiving a letter from him. Correcting my former testimony will say that my present salary is three thousand dollars a year instead of $300.00 a month. Don't remember when I met Mr. Searls. Think it was at the Knickerbocker the second time I met McMurtry. Don't remember the date or the circumstances. Cannot say that I didn't meet him at the time I signed the power of attorney for the location of lands in California. Have no way [181—74] of fixing the time when I

(Deposition of Frank B. Chapman.)

met Searls. Don't know who introduced me to him. I recall the only time I met McMurtry aside from the time I signed the power of attorney was at the Knickerbocker, some time after signing the power of attorney. Don't recall just when it was. Don't think I met McMurtry between the time of signing the power of attorney and the execution of the ratifications. Don't remember meeting Searls during that time, or Freeman. Don't recall signing any papers in connection with this matter between the signing of the two ratifications. Yes, if I did it was in good faith as far as I knew. Would say I met Searls about three times in all. Don't think I ever met Freeman after signing the power of attorney until I met him in San Francisco when I was a witness.

Q. How many times did you meet Mr. Thorn from the time you signed your power of attorney up to the time you went to San Francisco? A. I would say three or four times. Q. Can you tell me the place or places where? A. Why, I recall once when he came after my proxy at Kenosha Lake and on the train at Middletown, and I believe he was present when I met Mr. McMurtry the second time at the Knickerbocker Hotel.

I think I had met McMurtry twice before going to San Francisco; the first time, the time I signed the power of attorney and the second time at the Knickerbocker Hotel. I think Freeman, Thorn and Searls were present at the Knickerbocker Hotel, when I saw McMurtry. They are only the only ones I know.

(Deposition of Frank B. Chapman.)

I have not a definite recollection of Freeman being there. It is possible that he was not. Think Freeman phoned me that McMurtry was at the Knickerbocker and wanted to see me and that Freeman was present at the interview. Am quite positive he was there. Would not say positively, but think Searls was there and also Thorn. Don't [182—75] recall anything that Freeman said to me at that time, or Searls or Thorn. The conversation was between McMurtry, I think, and the rest who were present. I don't recall what was said by a single one other than McMurtry. I recall that someone phoned me that "McMurtry was on from the west and would like to have me come up and meet him and hear what he had to say, or words to that effect."

Q. Well, you went. A. Yes, sir, and I told him I was very busy, but I would try to come up.

No, I had no other business with McMurtry except because of this power of attorney. Yes, I went there during business hours the same day that I was phoned. Stayed there about fifteen minutes, possibly longer. Have not read over the testimony that I gave in San Francisco, nor has it been read to me. Have no copy of it. Have no epitome of it. At this meeting at the Knickerbocker Hotel, all I recall is what Mr. McMurtry said, and I don't recall all of that, but he told of what a hard time he had had to hold the locations for lands, or something of that kind; that he had sat up nights, etc., to keep on the job; and I think at that time he said that there were some moneys coming to us, but they did not have it;

(Deposition of Frank B. Chapman.)

they were in pretty hard shape, and I think he said that he was going, they were going to form a company for the locators, or something to that effect. That was all I remember.

Q. Did he speak about having advanced moneys and paid out moneys? A. Yes, I think he did. Q. Did he speak about the assessment work that was done? A. I believe he mentioned that in connection with his experience. Q. And did he speak about making a contract for drilling for oil upon some of those lands with somebody? A. I don't recall that. Q. Did he speak about the prospective value of these lands. A. Not that I recall. [183—76]

Don't remember that he said where the lands were. Yes, think he said something about somebody trying to jump the land that he had located. Don't recall that he spoke of risking his life prospecting lands or that he was guarding them with guns. Don't recall having heard from Freeman, Searls or Thorn anything about jumpers or trouble in holding these lands, or borrowing money in order to protect his interests that he had located. As near as I can recall, it was McMurtry who told us this at that time.

Q. Did he say anything about your being entitled to any money at that time? A. I think so. Q. What did he say in that regard? A. I think he said we were entitled to—I think he said we were entitled to $250, or something of that kind.

No, he didn't give it to me. He said they were in hard shape, financially. No, I did not then tell McMurtry, "What have I got to do with that? That

(Deposition of Frank B. Chapman.)

does not interest me." No, I did not repudiate the transaction at that time and say to Mr. McMurtry, "Why, you have not got any money from me," nor that the fact that he was risking his life protecting these lands did not concern or interest me. I do not recall that he told me that I could look for $250 out of the enterprise or give me any encouragement as to an early return.

Q. No. Didn't tell you a word about having made a contract, and that it would depend upon whether the locators ratified the contract or not, as to whether he would get any money out of it or not, did he? A. He might have mentioned that; I believe he did say something about it, that it depended upon what the Government did, or something of that kind. Q. Did he also tell you at that time that he expected a little trouble with the Government on account of withdrawals? A. I don't remember withdrawals, or [184—77] just what he said. Q. But you now have a recollection that he did speak to you about the fact that he had made a contract with somebody for something on all of these lands that had been located, and it was necessary before he got any money out of it, to get a ratification from the locators? A. I don't remember that. Q. You just said a little while ago, as I understood you, that you could recall something about a contract? A. No, not about a contract, he did not, but about what the Government would do, and as to whether they could hold the lands.

No, I don't recall at this meeting Mr. McMurtry making any allusion to the fact that he had received

(Deposition of Frank B. Chapman.)

my ratification of such contracts, No, I received nothing at all at that meeting. Do not recall that I signed anything at that meeting, but will not say that I did not.

Q. I show you check 159, dated New York, September 11, 1911, signed F. H. Searls, which has your signature under the following language:

> "Received from L. B. McMurtry, $250, in full payment for all my right, title and interest in and to all lands located by said L. B. McMurtry, on my behalf, in Kern County, California, pursuant to a power of attorney made by myself and others to L. B. McMurtry, bearing date the 21st day of December, 1907."

Will you testify positively that you did not put your name on the back of that check under that writing at the Knickerbocker Hotel in 1911, in the presence of Mr. McMurtry and Mr. Searls? A. No, sir.

Q. You will not so testify? A. No, sir.

Q. And so far then as your present recollection is concerned, it might be true that you did put your name on the back of that check at that time and place? A. It might be possible. [185—78]

My attention being directed to certificate No. 27 for 1000 shares of stock in the Pacific Oil Lands Company, issued to Frank B. Chapman dated September 1st, 1911, and the receipt attached to the margin of that certificate pasted in the stock certificate book, which receipt reads: "Received certificate for 1000 shares of Pacific Oil Lands Company, dated September 11th, 1911," I cannot say where I

(Deposition of Frank B. Chapman.)

was on September 11, 1911, or what I did with this receipt after signing it. At the time I received this five hundred dollar bill from Mr. Searls, he handed me a check which I signed and then he handed me the bill.

Q. Did you receive five hundred dollars for the check or did you receive five hundred dollars for your stock?

A. I suppose the check was for the stock.

Q. Did you sell your stock to Mr. Searls?

A. I turned it over to him.

I think this was at the Knickerbocker Hotel, though it may have been some other hotel. It was not on the occasion that I met McMurtry there. It was afterwards. It was in Searls' room and I think at the Knickerbocker Hotel. I am certain it was in New York. No one else was present besides Searls and myself. I went to his room and after the formal shaking of hands, he said, "Did you bring your stock?"—this is approximately—and I said "Yes," and he said, as near as I can remember, he said, "Well, I want you to turn it over to me, because," he said, "we may have some trouble," or something like that, "with the Government," or something, "in holding your patents, and you will never get any more out of it anyway," and "you will possibly never have another occasion; it will never be worth any more, and we are going to pay you for the favor you did us, if that will do it." I said to him, I said, "I don't see what I have done, Mr. Searls, to warrant this receipt of this money,"

(Deposition of Frank B. Chapman.)

and he said, "Well, that [186—79] is all right, you have done the same as the rest of the locators, you gave us a power of attorney, and we think it is worth that much" or words to that effect. So he says, "Have you got the stock with you?" And I said, "Yes," and I gave it to him, and he took out his purse and he said, "You sign this paper," which I did, and he handed me a five hundred dollar bill.

Q. Now, Mr. Chapman, repeat to me, after telling me the place where it was held, any conversation that occurred at the time that you got the certificate for 1000 shares of that stock.

A. As I recall it, both shares were mailed to me in one envelope.

Q. When you say "both shares" what do you mean? A. Both certificates.

Q. What do you mean by "both certificates"?

A. I received one for 1000 and the other for 700 or 750.

Q. Mailed to you by whom? A. I do not recall. I think they were sent by Mr. Thorn. Don't recall that any letter came with them. No, I had no transaction whatever with Mr. Thorn which warranted him in sending me these certificates. I assumed he was acting as an agent for Mr. McMurtry. I cannot say why McMurtry sent them. I believed at the time that it was in payment for this $250, or something of that kind, that he claimed was due us. Yes, all of this was after this conversation with McMurtry, and I think after I received a letter from Freeman at Cumberland, Maryland, telling me I

(Deposition of Frank B. Chapman.)

might get rich out of this thing, or something to that effect.

Q. But you had been advised, as you have already testified, by Mr. Freeman as to the possibility of getting rich, and by Mr McMurtry as to the trouble that he was having with the holding of these lands, and by Mr. McMurtry as to the making of a contract or contracts for the sale of these lands?

Mr. HALL.—I do not wish to interrupt counsel any more than [187—80] is necessary, but, in order that the Court, before whom this cause has to be finally heard, may not misjudge my silence, I want to now protest against the extended and useless and argumentative cross-examination of this and all other witnesses.

A. The first two, yes; the last one, I cannot, I am not sure of.

Q. Notwithstanding the fact that in the year previous you had ratified the contract that he had made in your name, still you are not sure that you knew him? A. I presume I did at the time.

Q. When Searls told you that he wanted to give you something for what you did and you had better take five hundred dollars or maybe you would not get anything the next time, or something to that effect; and, in order not to be taken to task by Mr. Hall, I am only undertaking to state the substance of your answer, and in order to cure any possible defect in his quotation, I refer to the last answer that you made as to the conversation with Mr. Searls, did you suggest to him that the statement had been made

(Deposition of Frank B. Chapman.)

to you by Mr. Freeman that you were going to get rich out of these locations?

A. I don't think so, no.

Q. Did you tell him at that time that you knew that a contract had been made for the sale of these lands, and asked him how much money had been realized from them? A. Not that I remember.

Q. Did he make a report to you as to what had become of it? A. I don't think he did.

Had only one talk with Mr. Searls and that was at the Knickerbocker Hotel at the time he gave me a check which I endorsed, and in lieu of the check he gave me a five hunded dollar bill, and it was on that occasion that I endorsed the stock and gave it to him. He had either phoned or left word with my landlady for me to come to the hotel and bring the stock.

Q. Mr. Chapman, what reason had Mr. Searls assigned to you desiring to buy your stock for $500 and in the same breath to tell [188—81] you that if you did not take $500, that you would probably not get anything. What reason did he give you for that stand?

A. Well, he said they expected, I think—they were having some trouble with their patents, etc., and things were in an unsettled state, or words to that effect, and things were uncertain.

I don't recall asking him what the nature of the trouble was or his telling me or that he spoke of the fact that some of the lands had been disposed of to Mr. McLeod, the Associated Oil Company, or any-

(Deposition of Frank B. Chapman.)

body else. Don't recall that he said anything about the land having been withdrawn after locations were made.

Q. Did he tell you that he was buying this stock for himself or somebody else?

A. He said they were simply redeeming it, that was all.

Q. Had he told you that he had any interest in that land, or in that corporation? Why, I believe he did.

Don't know that he told me that he was one of the locators but I assumed that he was. He did not tell me he was selling his stock for the same amount of money or tell me who the bearer was. The reason he gave why the stock was wanted was that "They might have some trouble in holding their patents, or holding the lands." No, I don't recall receiving a letter at the time I received the stock advising me to hold it and it would probably be very valuable, though I will not say that I did not. Put my signature on the back of this certificate of stock transferring it to Walter S. Brann at the time I met Searls at the hotel, I think. It might have been then or it might have been before, I don't recall. Don't remember that Brann's name was on there when I signed it. Have no recollection of putting my signature on there at the time I gave the certificate to the young lady to whom I was practically engaged at that time. She had it from the time I handed it to her when I received it, to the time when it was surrendered to [189—82] Mr. Searls, I

(Deposition of Frank B. Chapman.)

should say approximately two years. Never had any falling out with Mr. Freeman. Don't recall having any talk with Thorn about the sale of this one thousand shares of Pacific Oil Company stock or about its value. When I disposed of this one thousand shares, the other 750 shares of whatever company it was went with it. All of this stock was given to the lady. She had the whole thing. I don't know that I gave it to her outright; I handed it to her, and that was all; I did not turn it over to him, or anything of the kind.

Q. I misunderstood you. I thought you had given it to the lady as a present?

A. Well, she could have had it.

Q. Oh, I suppose she could have had anything you had?

A. Yes, sir, or anybody else could have had it.

Q. But nobody else could have had the five hundred dollars which you got?

A. Well, they could have had it the day before.

No, I didn't know when I received this $500 what McMurtry had received for these lands.

Q. But you did hear when you were in San Francisco at the time you got this five hundred dollars he had already received a large sum of money, up in the millions, for these properties that were located?

A. Well, I don't know that I heard any definite date or when it was received.

Q. Didn't you ask? A. I don't think I did,

Q. You didn't pay enough attention to it when

(Deposition of Frank B. Chapman.)

you were in San Francisco to ask any questions about it? A. No, sir.

Did not hear McMurtry's testimony though I heard one or two testify.

Q. I want you to explain me, if you can and will, why the day before you sold the stock to Searls for $500, you said you were willing to give it to anybody for nothing?

A. I did not [190—83] expect any money for it.

Q. Yes.

A. And I thought when Mr. Searls asked me to come down, he wanted the stock back.

Q. Now, I want you to explain how and why you say that on December 13th—I want you to explain why it is you can say you had given that stock away and asked no questions about it, when, on the previous December, and the 13th of that month, you signed a consent as a stockholder in the Pacific Oil Lands Company, that that corporation should set aside $20,000 in cash assets to be declared as a dividend upon the stock of that corporation, and also such other sums from time to time as the Board of Directors in their discretion might deem advisable; I want to know your reasons for being willing to give away stock of any corporation which you consented in the December previous that they could pay a dividend of $20,000?

A. Because I never expected to get a cent out of it when I signed it.

Q. Did you think it was a fake when you signed that consent to a dividend of $20,000?

(Deposition of Frank B. Chapman.)

A. I had no confidence in it.

Q. Did you think it was a fake when you signed your consent to a payment of a $20,000 dividend?

A. What do you mean by "fake"?

Q. I will answer your question by asking you to tell me what you thought you were doing when you signed a consent to the Board of Directors of that company as a stockholder to declare a $20,000 dividend?

A. I cannot tell you what I thought at that time.

Q. Who got you to sign Exhibit No. 6, a consent to a $20,000 dividend, dated December 13, 1913?

A. I cannot tell you. Nor can I tell when I signed it nor what I did with it. Don't remember signing it. Hearing it read I still do not remember signing it nor do I recall receiving a dividend. [191—84]

Redirect Examination.

Q. In your cross-examination you have referred to signing two proxies. I invite your attention to Government's Exhibit 1 and Government's Exhibit 2; are those the papers which you designate as proxies? A. I do not recall signing this one (indicating) but I assume it was a proxy; and I do recall two instances when I signed papers very vividly, because I was on my vacation in each instance, and Mr. Thorn came to Kenosa Lake for the last one, and I signed it in his presence, but whether that was the proxy—I think it was the proxy; I don't see that here. Q. The first time you met Mr. McMurtry was when, before or after you had signed the power of attorney? A. After. No, I don't

(Deposition of Frank B. Chapman.)

think I was asked to put up any money on account of the improvements on these lands at the time I had the conversation with McMurtry at the Knickerbocker Hotel. [192—85]

**Deposition of Charles W. Gardiner, for Plaintiff.**

CHARLES W. GARDINER, called April 16, 1917, on behalf of the plaintiff, testified by deposition as follows:

Reside at 235 North Pine Avenue, Chicago, Illinois; am a physician and manufacturer, manufacturing steel cabinets and makers of clamps. In December, 1907, my home was in New York, and was temporarily in New York City. Did not have any occupation. Am a practicing physician, graduate of the University of Vermont '91. Not now practicing to any large extent. Am the Charles W. Gardiner who, together with others, executed the power of attorney, Plaintiff's Exhibit 5. Signed it on the representation of a friend of mine, Frank H. Searls. Had known him since boyhood days. Was not very intimately associated with him. It was about a couple of weeks before executing this paper that he asked me to do so. My remembrance is this occurred at his place of business on East Sixteenth Street, New York City. He set forth that they were trying to get several of their friends to—I do not recall whether it was to enter into an agreement—as I understand it, it was to go in it together for the purpose of attempting to discover or locate certain properties. They were Mr. Thorn,

(Deposition of Charles W. Gardiner.)

Mr. Searls and a number that I did not know at that time. Was not at that time acquainted with Mr. L. B. McMurtry. He set forth that there was an opportunity of attempting to locate certain lands for something or other, it might be metals or oil or some other matter, and that there was an opportunity and probability that we might discover something and thereby get a profit out of it. Understood that the lands were in California, and they might be elsewhere. Saw Searls practically every day. The next time I recall discussing this particular subject was at Batavia, New York, after signing the power of attorney. The day the power of attorney was executed he told me to go down to a certain building near the United States Post-office in New [193—86] York City, and that I would find there Mr. Thorn, whom I had met, and I was to execute before a notary a power of attorney to Mr. McMurtry. I read over this power of attorney. The next time I talked to Searls about this was at Batavia, New York, about six months later. Nothing was then said except that in his opinion it was going to probably turn out to be a good thing. Remember several circumstances in connection with this transaction, but the order in which they occurred I cannot swear. Remember receiving a communication, I think from Mr. Searls —I don't know whether it came from Mr. Searls or not—I received a communication asking me to verify the power of attorney which I had given to Mr. McMurtry. I should say that is my ratifica-

(Deposition of Charles W. Gardiner.)

tion. I recognize the duplicate signature and that of the notary.

(This ratification read in evidence as Plaintiff's Exhibit 7. It is similar in form to Plaintiff's Exhibit 1 with the deposition of Frank B. Chapman, and purports to have been executed August 15, 1910.)

This paper came to me by mail. I don't remember from whom. There was a letter accompanying it which has been destroyed or lost. It said that it was desirable to verify the power of attorney that I had given; of course some reason must have been given, but I cannot explain now just what that letter said. My recollection is that I forwarded it to Mr. McMurtry's office in San Francisco. Think I received it from McMurtry. Was not then personally acquainted with McMurtry. The next incident growing out of these transactions that I remember was signing a proxy for Mr. McMurtry to vote for me at a counsel meeting. My remembrance is that I received it from McMurtry and returned it to him. Do not remember the date. It was for the purpose of voting my interest in the matter which Mr. McMurtry had in hand. [194—87]

I received shares of stock but don't remember whether it was before or after that particular time; received no money or other thing of value at the time I executed this ratification. Later I remember receiving a check for twenty dollars. Think it came from McMurtry's office. Don't recall

(Deposition of Charles W. Gardiner.)

receiving any money prior to that, but I endorsed a check for $250. Received no money by reason of endorsing that check. That is my signature on the back of check dated New York, May 6, 1911, No. 149, drawn on the Second National Bank of the City of New York, payable to the order of Charles W. Gardiner, for the sum of $250.00, and signed F. H. Searls. Cannot give the date that I first saw this check.

The circumstances of signing that check are that in a conversation with Mr. Searls he asked me if I preferred to receive some cash or some stock and my reply was that I preferred to take the stock. The check was sent to me and I endorsed it and returned it to Mr. Searls and the stock was subsequently sent to me. It was stock in the Columbus Midway Oil Company. I think 750 shares. My remembrance is that this matter of the check and shares of stock in the Columbus Midway Oil Company came up by correspondence with Mr. Searls. Think this letter is probably destroyed. Had no further conversation with Searls concerning this check than I have stated. My understanding that this Columbus Midway stock issued to me was my interest as a locator under the power of attorney given to Mr. McMurtry.

(Check No. 149, for $250, dated May 6, 1911, payable to Charles W. Gardiner, similar in form to Defendant's Exhibit "T," read in evidence.) (See Plaintiff's Exhibit 50.)

I read the endorsement on the back or this check

(Deposition of Charles W. Gardiner.)

before I signed it. Don't think there was anything in the language that I didn't understand. Cannot remember that I had then been advised [195—88] that any locations at all had been made by Mr. McMurtry acting as the attorney in fact of myself and others in the State of California. That is something I cannot remember. Did not know at that time how many locations had been made under the mining laws by Mr. McMurtry as my attorney in fact in the State of California. Cannot swear that at any time I was advised as to the number of locations on the public domain that were made by Mr. McMurtry acting as my attorney in fact under this power of attorney. Cannot swear that I was informed of all this. Don't remember when I was advised of the number of locations upon which my name had been used, or how long it was after the signing of the power of attorney. Don't know whether or not I knew what my interests were in oil lands in California that had been located by Mr. McMurtry acting as my attorney in fact when I signed this check No. 149.

I read this ratification before signing it. Don't remember whether previous to that time I had been advised that any locations had been made by Mr. McMurtry on the public domain acting as my attorney.

Q. At the date you executed the ratification, did you know what lands were affected by the contract of August 4, 1910, between Mr. McMurtry and your attorney in fact and W. F. Herrin and others? A.

(Deposition of Charles W. Gardiner.)

I don't recall the circumstances. Don't remember whether the contract between L. B. McMurtry as my attorney in fact with W. F. Herrin, of date August 4, 1910, was exhibited to me at or prior to the time that I executed this ratification. You are asking me questions that I really cannot answer. I don't remember. Q. Did you, at the time you executed Exhibit 7, know anything about the contract between McMurtry and Herrin and others, of date August [196—89] 4, 1910, or of the lands which were affected by it? A. I wish I could answer your question, but I don't want to evade your question. Q. I don't think you do, Mr. Gardiner. A. But those are matters that are very hazy in my recollection, and I don't want to make a misstatement. Q. Did you, prior to the time that you executed Exhibit 7 on August 15, 1910, seek any information or advice as to the contents, purpose, or effect of the contract of date August 4, 1910, from any person whomsoever? A. Yes, through Mr. Searls. Q. What advice did Mr. Searls give you as to the purport and effect of the contract of August 4, 1910, or the lands that were affected by such contract, if he gave you any advice? A. You mean about ratifying the power of attorney; is that what you mean? Q. Yes. A. He advised me to do it; he advised me to ratify the former power of attorney when the papers were sent on to me. Q. What reason did Mr. Searls give you at that time, if any, why you should sign this ratification? A. To facilitate the work of Mr. McMurtry in the prem-

(Deposition of Charles W. Gardiner.)

ises. Q. Did you seek at that time, from Mr. Searls, any information with respect to the quantity of land that was affected by the contract between Mr. McMurtry and Herrin and others, of date August 4, 1910? A. Not that I remember of. The only correspondence or communication I had with any person during 1909 and 1910, with respect to these transactions was personal correspondence with Mr. Searls and "what may have been sent to me as reports from Mr. McMurtry's office." I have none of them now. They have been lost or destroyed.

Q. Those were received during the year 1909 and 1910, were they? A. I don't remember. Q. Well, did you receive any reports from Mr. McMurtry's office prior to the time you executed this check 149? A. I cannot answer that either; I have no [197—90] record of the matter and I cannot remember. Q. What information was there contained in those reports that you received from Mr. McMurtry's office? A. I have a remembrance of a report from his office, but the date I do not remember, telling of certain activities in the field, but that is as far as I can remember; I cannot remember the purpose of the report, except that they said something about what had been done.

At the time I signed my name on the back of check No. 149, dated May 6, 1911, I understood that McMurtry was making arrangements with some party to work, to prospect. As I understood it, they did not have enough funds to develop it as

(Deposition of Charles W. Gardiner.)

they wanted to, and they had to make arrangements with somebody else to do it for them.

Q. Who was it that didn't have any funds? A. The locators through the power of attorney to Mr. McMurtry. Had you at that time been called upon to contribute any money or means towards the development of any property located by the use of your name? A. No, sir. Q. At the time you signed check 149, did you expect to be called upon to contribute any funds towards the development of the property which had been located by the use of your name? A. That would depend upon conditions. Q. What was the exact state of your mind on that question? A. Why, we were trying to find something and if we found a good prospect, we would have to get some money to develop it and I would be expected to put in my share. If it was a good prospect, why, I would take it up in some way. Q. Did you have that expectation at any time after you signed this check 149? A. Yes. It was all according to the outcome of the location and the procedure. Q. Mr. Brann has produced the original stock-book of the Pacific Oil Lands Company, and I invite your attention to certificate [198—91] No. 30, which was issued on September 1, 1911, and shows that Charles W. Gardiner was entitled to 1000 shares of the capital stock of the Pacific Oil Lands Company; attached to the stub of that certificate is the following: "Received certificate No. 30 for 1000 shares of Pacific Oil Lands Company, dated September 11, 1911. Charles W.

(Deposition of Charles W. Gardiner.)

Gardiner." That is your signature to that receipe (showing witness)? A. Yes, sir. Q. Endorsed on the back of that certificate No. 30 is the following:

> "For value received ——— hereby sell, assign and transfer unto Walter S. Brann ——— shares of capital stock represented by the within certificate, and do hereby irrevocably constitute and appoint Walter S. B*t*ann the transferee of said stock on the books of the within named corporation, with full power of substitution in the premises.
>
> Dated ——— 19—.
>
> CHARLES W. GARDINER.
>
> In the presence of
>
> ———————————."

Is that your signature to the bottom of that (showing witness)? A. Yes, sir. Q. Why was this certificate No. 30 for 1000 shares of stock issued to you? A. It was part of my share in the proceeds resulting from the location furthered by Mr. McMurtry. Q. At the time this certificate No. 30 was issued to you, or about that time, you had also received a certificate in the Columbus Midway Company? A. That is my remembrance. Q. Had you received any money growing out of these transactions at that time? A. Yes, sir. Q. How much money had you received? A. I don't know that I had received it at that time, but it may have been before and it may have been after, probably after I received — I don't know whether you would call it a [199—92] dividend

(Deposition of Charles W. Gardiner.)

or a division of twenty dollars. Q. Who tendered this certificate No. 30 in the Pacific Oil Lands Company to you? A. My remembrance is that it was sent to me by Mr. Searls. Q. Was that sent by letter? A. I believe so. Q. Have you the letter now? A. No, sir. Q. What has become of it? A. I believe it is destroyed. I did not keep those things. Q. What did Mr. Searls say, in substance, if you cannot give us the entire letter, as to why he was sending you this Pacific Oil Lands Company stock? A. I understood that under the workings of the power of attorney given to Mr. McMurtry, that I was to have my share, and this was part of the share of—that came out of the proceeds.

. . .

Q. I am asking you to give me the substance of what Searls said in that letter, and not what your idea was, but what Searls said in that letter? A. I don't remember just what he said, but I suppose it was, in substance, what I have just stated.

No, did not know at that time what the assets of the Pacific Oil Land Company were. Yes, I presume I had then heard of the contract dated August 4, 1910, and the supplemental contract dated August 6, 1910, between McMurtry and Herrin and others, affecting the lands in Kern County, upon which my name had been used as a locator. Cannot say that I then knew the terms and conditions of these contracts. I now understand that "there was an arrangement being made for part of the property to be developed by the company or a

(Deposition of Charles W. Gardiner.)

party whose name I cannot state, and that I was to have certain, expected certain returns from this procedure; was to receive my *pro rata* share among the locators. After expenses were paid and Mr. McMurtry was reimbursed for his services, I expected that the returns would be divided among the locators. Yes, I read the certificate No. [200—93] 30 when I received it. Don't know whether I knew at that time that the contract of August 4, 1910, and the supplemental contract of August 6, 1910, had been assigned by McMurtry as my attorney in fact to the Pacific Oil Lands Company. At the time I signed the check No. 149 on May 6, 1911, I believe I had heard of the contracts of August 4 and August 6, 1910, from Mr. Searls. Believe he advised me of the contents of those contracts and the purposes of making them. In a general way I was then familiar with those contracts, was acting under the advice of my friend Mr. Searls. Cannot say what advice he gave me as to the purpose of making those contracts. Yes, at the time certificate No. 30 came into my possession I believe I knew the number of shares of stock of the Pacific Oil Lands Company, but don't remember now what they were. Believe I must have then had a general idea as to what distribution had been made of the capital stock of the Pacific Oil Lands Company.

Q. Were you advised of the fact when you received your certificate of shares in the Pacific Oil Lands Company that on September 1, 1911, 999,997 shares of stock in the Pacific Oil Lands Company

(Deposition of Charles W. Gardiner.)

had been issued to L. B. McMurtry, that on the same date one share of stock had been issued to Harold H. Maundrell, and one share of stock issued the same date to Esther Harris, and one share on the same date issued to Walter S. Brann? A. I don't remember. Q. Were you advised when you received your share of stock that on September 2, 1911, L. B. McMurtry transferred to F. E. Harrison, 140,000 shares of the capital [201—94] stock of the Pacific Oil Lands Company? A. I don't remember. Q. Were you advised at the time that you received your certificate that on September 1, 1911, L. B. McMurtry transferred to E. W. Kay, 130,000 shares of the capital stock of the Pacific Oil Lands Company? A. I don't remember. Q. Were you advised at the same time that L. B. McMurtry transferred on September 1, 1911, to Fred B. Hughes, 90,000 shares of the capital stock of the Pacific Oil Lands Company? A. I don't remember. Q. Were you advised at the date you received and accepted your certificate No. 30, conveying to you or transferring to you 1,000 shares of stock in the Pacific Oil Company that each of the locators had also received a certificate, or that there had been issued to each of the locators a certificate transferring or conveying to them 1,000 shares of stock in the Pacific Oil Lands Company, and that the balance of the stock was held for the use and benefit of persons other than those whose names appeared as locators of the lands which were affected by the contracts of August 4th, and the

(Deposition of Charles W. Gardiner.)

supplemental contract of August 6th, 1910? A. I don't remember; I cannot answer that question.

Don't know how long I retained this certificate No. 30. It might be a couple of years. Sold it to Mr. Searls. He explained to me that, under the contract, or lease, or whatever it was, with the parties who were working certain territory, from them I might expect to receive certain moneys or divisions, or dividends, very uncertain, according to circumstances, and asked if I desired to continue under those conditions, or if I had rather take a lump sum and dispose of my interest. I preferred [202—95] the lump sum and disposed of them to Mr. Searls. He paid me $500.00 in cash for the stock. My remembrance is that I also surrendered the stock in the Columbus Midway. Cannot say that any of the lands which my name was used to locate were then held or claimed by the Columbus Midway Company. I believe they were. Cannot say what lands. Imagine it must have been during 1914 that I delivered this stock to Searls. Cannot say what other interest or interests I claimed in any of the lands located by the use of my name at that time. I was relying upon my friend Mr. Searls to look after my interests in those matters. Cannot say that I had any other evidence such as papers or writing or any verbal promise as to any interests in any of those lands.

Since I have surrendered this certificate and since I signed check 149, if there was anything I might do rightfully under those premises, I expected that

(Deposition of Charles W. Gardiner.)

Mr. McMurtry, acting under the power of attorney, would look after my interest.

Don't know that McMurtry has given me any money or promise or anything else since I surrendered this stock in the Pacific Oil Lands Company, nor do I remember that this company has given me any evidence or any interest since then. Don't believe now I have any interest in the Pacific Oil Lands Company, and don't remember that I have ever exercised the rights of a stockholder in the Pacific Oil Lands Company since I surrendered this certificate No. 30.

The details of the locations I don't know about.

Q. Did you know the state of development of those four placer mining claims (Minnesota, Massachusetts, New Jersey and Virginia) at the date of the surrender of Certificate No. 30? A. I don't believe I understood all of the conditions which you [203—96] stated. Q. What conditions did you know or understand at the time you surrendered certificate No. 30? A. What I have just stated a few questions ago, or a few answers ago. Q. You misunderstand me. I am asking you now exactly what you knew as to the state of development of those four placer mining claims at the date you surrendered certificate No. 30?

Mr. ANDREWS.—You mean of his own knowledge?

Mr. HALL.—Of his own knowledge, or by information from any person.

A. I don't believe I can answer that question. Q.

(Deposition of Charles W. Gardiner.)

Did you have any knowledge as to the state of development at that time? A. I have a remembrance of a report sent to me from Mr. McMurtry's office regarding the California locations, but whether that referred to the exact part as you just state or not, I don't remember. Q. I invite your attention to three sheets of typewriting matter bearing the heading, "Pacific Oil Lands Company." First Report to Stockholders." In pencil, "Jan. 1914," and over in the upper left-hand corner the initials "H. A." and "F. H." Is that the report you had at that time (showing witness)? A. I believe it is the same report that I received or a copy of it.

Think I had received and read a copy of this report prior to delivering this stock to Searls and understood its contents in a general way. While I had this stock certificate I think I received a check for $20.

Q. I invite your attention, Dr. Gardiner, to check No. 1193, dated San Francisco, January 8, 1914, drawn on the Bank of California, National Association. Pay to the order of Charles W. Gardiner, for the sum of Twenty Dollars, signed Pacific Oil Lands Company, F. E. Harrison, Secretary and Treasurer, L. B. McMurtry, Vice-President. On the back thereof is the following, among other [204—97] endorsements: "Pay to Batavia Clamp Company, Charles W. Gardiner." Is that your signature on the back of that check (showing witness)? A. Yes, sir. Q. Is that the check you referred to as the $20 you received? A. Yes, sir. Q. Why was that

(Deposition of Charles W. Gardiner.)

check given to you or paid to you? A. My share of certain of the proceeds from the development of the location. Q. Prior to the time you received that check, had you signed any papers with respect to the issuance or payment of any dividends by the Pacific Oil Lands Company? A. I probably did, but I don't remember. Yes, that is my signature on the paper purporting to have been signed by Charles W. Gardiner and acknowledged before D. B. McKenzie, a Notary Public, on August 13, 1913. As I remember, it came from McMurtry's office by mail. Presume there was a letter of transmittal. Cannot say. The letter has been destroyed.

Q. Can you tell me the contents of it? A. I was asked to grant permission of this action and make an affidavit before a notary, which I did, and return.

That is my signature on the paper which starts out "Pacific Oil Lands Company," and dated December 9, 1913. Received these two papers at different times. Received one in August. (The check and papers above referred to are as follows:)

San Francisco, 1–8, 1914. No. 1193

THE BANK OF CALIFORNIA
NATIONAL ASSOCIATION,
San Francisco.

Pay to the order of Chas. W. Gardiner—$20.00—Twenty and 00/100 Dollars.

PACIFIC OIL LANDS CO.

L. B. McMURTRY, Vice-Pres.

F. E. HARRISON, Secy. & Treas.

(Stamped in center) "The Bank of California Clearing House, paid Jan. 19, 1914." [205—98]

(Deposition of Charles W. Gardiner.)

(Back of check reads as follows:)

"Pay to Batavia Clamp Co. Chas. W. Gardiner. Pay BANK OF BATAVIA, Batavia, N. Y., or order, BATAVIA CLAMP CO.

Wells Fargo Nevada Nat'l Bank of San Francisco, Pay only through Clearing House, 16, Jan. 19 1914. Pay to the order of Any Bank or Banker, all prior endorsements guaranteed. BANK OF BATAVIA. 50–308 Batavia, N. Y. 50–308. H. T. Miller, Cashier.

Pay to the order Wells Fargo Nevada National Bank of San Francisco, Prior Endorsements Guaranteed, Jan. 17, 1914, California National Bank, Sacramento, California, Fred W. Kiesel, Cashier.

Pay to the order of Any Bank, Banker or Trust Co., All Prior Endorsements Guaranteed. Jan. 13, 1914, Columbia National Bank, Marine National Bank, Buffalo, N. Y."

(Consent last above referred to is similar in form to Plaintiff's Exhibit 6 with the deposition of Frank B. Chapman, and purports to have been signed by Chas. W. Gardiner, December 9, 1913.)

(Proxy last above referred to is similar in form to Plaintiff's Exhibit 6 with the deposition of Frank B. Chapman and purports to have been executed by Chas. W. Gardiner, August 13, 1913,) [206—99]

Q. At the time you surrendered certificate No. 30, had you been advised by anyone that on January 1, 1907, L. B. McMurtry, acting as attorney in fact under the power of attorney dated in December, 1903, had located in the names of P. F. Blackman, A. J. Rowley, Harry Sterling, W. Y. Husbands,

(Deposition of Charles W. Gardiner.)

D. G. Cunningham, John Ryan, B. M. O'Neill and James Clifford, the following placer mining locations, to wit:

"Ella," embracing the southeast corner of section 34;

"Searls," embracing the southeast corner of section 20;

"Illinois," embracing the southeast corner of section 22;

"Margaret," embracing the southeast corner of section 26; all in Township 31 South, range 23 East, in Kern County, California?

A. I don't remember. Q. At the time you surrendered certificate No. 30, had you been advised that L. B. McMurtry, acting as attorney in the fact for the eight persons whose names I have last given, entered into a contract with Mr. J. M. McLeod, for the development of the lands which I last described?

Q. The contract I refer to having been dated on or about October 8, 1908? A. I don't remember. Q. Was there any contractual—, A. Any what? Q. Any contractual or other relations which existed at any time prior to the surrendering of certificate No. 30, between yourself and your co-locators of the "Minnesota," "Massachusetts," "New Jersey" and "Virginia" claims, [207—100] and the eight persons whose names I have read, who were the locators upon the "Ella," the "Searls," the "Illinois," and the "Margaret" claims? A. cannot answer that question .I don't understand what you mean. Those particular points I don't remember about, even if I

(Deposition of Charles W. Gardiner.)

had any knowledge of them. Q. Do you now remember of any arrangement between yourself and any persons with respect to the lands embraced in these four claims, to wit, "Minnesota," "Massachusetts," "New Jersey," and "Virginia"? A. I don't remember any. First met J. M. McLeod when I was in San Francisco, in November and December, 1916. Do not know when I first heard of him. Mr. Searls might have told me, but further than that I have no remembrance. Did not know Mrs. J. M. McLeod or any of the members of the firm of Wheat, Wilson, McLeod & Gordon, or any of the officers of the Buick Oil Company, Associated Oil Company or Consolidated Mutual Oil Company. I was in San Francisco in November and December, 1916, at the request of Mr. Searls in reference to the McMurtry location proposition. He wired me and gave me a letter of introduction to Mr. Helm, and called at my office in Batavia. Said he was connected with the parties who were working or had purchased certain of the McMurtry locations. I don't know whether it was the Union or the Associated Oil. Helm was in consultation with me at Batavia only a few minutes. He said it might be necessary to ask me to go to San Francisco, and he wanted to know if I would go. It was to appear as a witness in certain litigation then pending. This was about September, 1916.

Q. Have you given us all the conversation that occurred? A. Why, no, but I will answer any question regarding it. Q. Well, I want you to be frank with me. I want to know what [208—101] this

(Deposition of Charles W. Gardiner.)

conversation was. Give me this conversation. Go on and give it all to me. A. As I understood it, there was some question as to the title to certain lands, and he wanted to see me and see that I was alive and wanted to know if I was one of the locators, and wanted to know if I would go out and appear in this certain litigation. Now, I think that was the purport of what was said. Q. Is that all of the substance of the conversation? A. That was the idea I have given you. Q. Was there any arrangement made at that time or at any subsequent time as to compensation for your going there? A. Yes. Q. What arrangement and when was it made? A. I don't know as to that. Mr. Searls wired me and I went.

There had consultation with Helm and Attorney Oscar Lawler. Did not appear as a witness then in any suit affecting any of the lands upon which I was a locator. No, I have not brought any action against L. B. McMurtry on account of the transactions growing out of this power of attorney dated December, 1907. Q. Do you contemplate any such action? A. Not now.

No, never received money or anything of value by reason of signing this power of attorney in December, 1911, since surrendering certificate No. 30. [209—102]

Cross-examination.

Yes, before being interviewed by Helm, had been interviewed by a Government agent concerning these locations. Was not asked to sign a statement and do not remember what he told me. I remem-

(Deposition of Charles W. Gardiner.)

ber very little about it, except that he called.

Q. At the time you entered into that contract of attorneyship, that is, making Mr. McMurtry your attorney in fact, had you ever told him, or anyone for him, that you would permit him to use your name to locate the lands for his benefit in California or elsewhere? A. No, sir. Q. The power of attorney granted by you to Mr. McMurtry was recorded in the public records of Kern County, California, in Book 10, at page 13, as is evidenced by the certificate of the County Recorder of that county, upon a certified copy handed me by Government's counsel at this time, and it appears that it was recorded—

Mr. ACH.—When, Mr. Hall?

Mr. HALL.—Is not the certificate on there?

Mr. ACH.—The certificate is on there; oh, yes. Q. On the 5th day of January, 1909, and it also appears that this power of attorney was recorded in San Benito County, California, in Volume II, of Miscellaneous Records, on April 13, 1908; prior to the last date which was January 5, 1909, had Mr. McMurtry or Mr. Searls or anybody asked you to give them a writing, acknowledging that whatever act that was done, by virtue of the power of attorney which you gave them relative to locating lands, should be, intended to be, for and on behalf of anybody else? A. No, sir. Q. Did Mr. McMurtry or Mr. Searls at any time advise you after January 1, 1909, at any time prior to your receiving the stock in the Pacific Oil Lands Company, that they wanted

(Deposition of Charles W. Gardiner.)

from you a secret or any transfer [210—103] of your interest in any locations that were made in your name in California? A. No, sir. Q. Was there ever any statement made to you by Searls, McMurtry or anybody else in behalf of McMurtry, or any other living person to the effect that they desired you to guard their interests, if any they had, in any locations made in your name in the event of your death? A. No, sir. Q. Did Mr. McMurtry or Mr. Searls, or anybody, at any time or at any place, in writing or verbally, make a request or a suggestion to you that you should not transfer any part of your or all of your interest in any locations that were made in your name to anybody else? A. No, sir. Q. Did you at any time yourself assign or transfer any interest in any location made in your name to anybody else? A. Except as set forth in that stock certificate. Q. I am not talking about the stock certificate. I am talking about transferring, about a transfer, conveyance or assignment of any part of your interest in any locations made for you by McMurtry? A. No, sir. Q. Did you ever execute any contract to the effect that you would assign, upon the happening of any contingency, any interest in any location that was made in your name by Mr. McMurtry, under this power of attorney? A. No, sir. Q. I show you the exhibit which Mr. Hall caused to be marked Government's Exhibit 7, which is a ratification of the power of attorney of December 21, and ratification of contract made on your behalf by McMurtry with W. F.

(Deposition of Charles W. Gardiner.)

Herrin, to which your signature is appended, and I ask you did you at any time prior to the execution of that ratification, sign any document of any kind or character yourself affecting any location which was made in your name by Mr. McMurtry? A. No, sir. Q. Did you ever have any conversation with Mr. McMurtry to the effect that he would be entitled to any of the lands that he located in your [211—104] name or to any interest in any of these lands in the event that he should locate any? A. No, sir. Q. Did you with Mr. Searls? A. No, sir. Between the time I signed the power of attorney and the disposed of the stock to Searls, did not meet or talk with McMurtry. He was not present to my knowledge when I signed the power of attorney. Neither McMurtry nor anyone for him, between the time of signing this power of attorney and the time I sold to Searls the stock asked me to recognize that McMurtry had any interest in the lands that were located or were to be located in my name.

Q. At the time you put your signature to the original power of attorney, did you have any intention of defrauding the Government of the United States? A. No, sir. Yes, it was my intention that McMurtry should make locations of oil lands in California, if he found any, by virtue of that power of attorney. When Searls asked me to sign this power of attorney he explained to me McMurtry's capabilities as an oil developer, and suggested that I become a locator in the premises, that he had con-

(Deposition of Charles W. Gardiner.)

fidence in him. Yes, he said he was to become a locator. I then understood that it took eight persons to locate a quarter section of land, or 160 acres. Cannot say that I then knew that the laws authorized every person to locate 20 acres for placer mining.

Q. Are you acquainted with any of the persons whose names I will now call off to you: Frank D. Taylor, Edwin L. Powell, J. F. Harder, S. H. Freeman. A. Yes. Do you mean I know them now or then? Q. Did you know them at the time that you signed the power of attorney? A. Go ahead. *A.* D. W. Darling, J W. Pentz. A. Yes. Q. C. W. Thorn? A. Yes, sir. Q. Herbert [212—105] Walker, W. A. Keenan, H. E. Bashore, C. Rupert Walker, R. P. Welch, Eugene Metz, F. H. Romaine, Jr., William Mahr, Samuel R. Banks, Frank B. Chapman, Julian P. W. Richmond, Fred S. Thorn, Harry B. Thorn, George W. Berry? A. Yes, I think that is his name. Q. George A. Meinecke, Francis E. Pratt, J. C. Thickens, William F. Christman, Mark W. Hatch, Hamlin E. Hatch, F. R. Bailey, Walter Wilson and J. E. Farrell. Now, the only person you knew was F. H. Searls? A. Yes, sir. Q. Now, did anybody tell you at any time that either or any of the persons whose names I have called off to you, or any persons that were interested in the locations made by Mr. McMurtry under the powers of attorney obtained here in New York, had transferred to him or any person of his selection, their interests in the lands which had been

(Deposition of Charles W. Gardiner.)

located or in the locations themselves? A. No, sir. Q. Was it ever suggested to you by anyone that either or any of those persons, or any of your associated locators, or any of the locators, used by Mr. McMurtry in the making of those locations had understood or agreed to transfer to Mr. McMurtry or any one of his selection, or to any corporation or any of the locations or any of the lands or any interest in any locations, or interest in any of the lands, referred to by me in my question? A. No, sir. Q. Was there ever any implied understanding on your part that Mr. McMurtry was to have any interest in any of the lands or in any of the locations made in your name? A. No, sir. Q. Did any of the individuals whose names I have called at any time assert to you that they had made any conveyance to Mr. McMurtry or anyone of his selection of their interest in the locations or in the lands, or any part thereof? A. No, sir. Q. Did either or any of those persons at any time assert to you, or in your presence state that they had executed any transfer to Mr. McMurtry, [213—106] or anyone of his selection at any time as to their interest in the locations or in the lands, or any part thereof. A. No, sir. Q. Mr. Gardiner, I am representing the Associated Oil Company, a corporation that through its nominees, W. F. Herrin and others, purchased from Mr. McMurtry, who represented himself to be your agent, and the agent of several others, some lands located by him, according to the records of Kern County, in your name; for those lands, to Mr.

(Deposition of Charles W. Gardiner.)

McMurtry, my clients paid in excess, as I understand the figures, of two millions of dollars. The Government of the United States, through these proceedings, are seeking to recover those lands from my clients, including the improvements my clients made upon the land, and in addition thereto, the value of all oil and gas taken from the land by my clients, upon the theory, among other things, that there was not a *bona fide* location of those lands, and that the locators were "dummy" locators, and that they had no substantial or real interest in the lands, but that they permitted themselves to be used for the purpose of enriching Mr. McMurtry, and permitted him to gain a greater part of the public domain than he as an individual was entitled to. Are you such a dummy, or were you such a dummy at that time? A. No, sir, I am not. Q. Before dealing with Mr. McMurtry as agent of yourself and these other colocators, it has appeared in evidence in some cases, and will appear in this case, I take it, that the Associated Oil Company [214—107] desired to know whether or not powers of attorney of the locators under which Mr. McMurtry was professing to act, had been rescinded, or were in full force and effect, or whether they had been modified, and also desired that those locators should confirm and ratify certain contracts which he, as agent of those locators, including yourself, had made with Mr. Herrin and others. The exhibit No. 7 you read at the request of Mr. Hall, did you not (showing witness)? A. Yes. sir.

(Deposition of Charles W. Gardiner.)

Q. Now, at the time of signing Government's Exhibit 7, did you read it? A. Yes, sir. I went to the office on Broadway, New York, about No. 248 or 290, where I found C. W. Thorn, who showed it to me and requested my signature to it. Was not told by Thorn or anybody at that time that I had no interest in the contracts or in the locations.

Q. Did Mr. Thorn at that time undertake to tell you in any way that he was a party to the contract with Herrin, or had ever seen it or read it, or had any copy of it in his possession, or anything of that kind? A. No, sir. Q. Had you ever seen a [215—108] copy of the contract that was made by McMurtry as your agent with W. F. Herrin and others? A. No, sir.

Nor had I seen the original or a copy of any contract that had been made by McMurtry with Herrin and other people on my behalf concerning the locations made in California. Had not received any money from McMurtry or anybody else at the time Thorn gave me this paper to sign.

Q. I see upon this check dated May 6, 1911, the endorsement of C. W. Thorn, which discloses the fact that after you endorsed this check it found its way into the hands of C. W. Thorn. Is it not a fact that after you received this check that Mr. Thorn proposed to sell you some Columbus Midway stock and sold it to you, sold you 750 shares of Columbus Midway stock, and that you paid him $250 for it with that check? A. Yes, sir. Q. Did Mr. Thorn tell you at that time what properties

(Deposition of Charles W. Gardiner.)

the Columbus Midway Company claimed to own, or tell you what the prospects were as to the success of that company? A. Mr. Thorn did not. Q. Who did, if anybody? A. Mr. Searls. Q. Mr. Searls? A. Yes, sir. Q. Was Mr. Searls here at that time? A. He was in the east at that time. Q. But the transaction of buying the stock, did that occur with you and Searls, or with you and Thorn? A. Between myself and Searls. Q. Do you know, then, how the signature or endorsement of Thorn came upon that certificate, or upon that check? A. I presume Mr. Searls passed it over to Mr. Thorn. Q. Do you know what position, if any, Mr. Thorn had with the Columbus Midway Oil Company? A. I understood he was selling stock for them. At the time I signed that ratification of McMurtry's I expected to get my proportional division of the proceeds, expecting him to be compensated for the services. There was no [216—109] written agreement, but it was understood "as much as I understand it."

Q. You are quite positive that it was never understood at any time, directly or indirectly, that he was to receive any indirectly, that he was to receive any interest in any of those lands, or any interest in any of these locations; is that a fact? A. Not to my knowledge. Q. You were never advised by Mr. McMurtry, were you, or Mr. Searls, of the receipt by Mr. McMurtry at the time that you signed this ratification of that power of attorney of any sum of money under those contracts, you were not told

(Deposition of Charles W. Gardiner.)

at the time you signed this contract or ratification that Mr. McMurtry had received any sum of money from Mr. Herrin, or the Associated Oil Company upon these contracts, had you? A. I don't remember. Q. Was Mr. Searls present at the time you signed the ratification? A. No, sir. Q. Just you and Mr. Thorn? A. No, sir; that was signed at Batavia, the ratification. Q. The ratification was signed at Batavia? A. I think so. Q. Well, then, I misunderstood you. A. The original was signed in New York City, the ratification was signed in Batavia. Q. Yes. Now, how did you get this ratification? A. It was mailed to me. Q. Then Mr. Searls was not present? A. No, sir. Q. And you don't remember what was in the letter. A. No, sir. Q. Then at the time did the letter state, or attempt to advise you that moneys had already been received or had not been received, upon these contracts, or that this thing was necessary because of the possibility of enforcing such a contract, or of the making of such a contract; do you remember anything about that? A. Why, I understood that the completion of the contract was pending the ratification of the locators. Q. I see. Now, then, were you ever told after that, or did you ever ascertain before you went to [217—110] San Francisco, if you ascertained it then, that Mr. McMurtry had been paid a considerable sum of money upon these contracts by the Associated Oil Company? A. I think that is set forth in the printed reports. Q. And before this printed report was made, have you any in-

(Deposition of Charles W. Gardiner.)

formation to the effect that he had received any considerable sum of money from this Associated Oil Company? A. I don't remember. When Searls bought this stock from me, he appeared to be buying it for himself; I was not sure. I was satisfied with his explanation and relied upon his statement as to the probable trouble of getting any more out of it. I believe he explained that the Government had withdrawn these lands and was claiming them.

Q. Yes; and is it not because of the fact that you understood you would be involved in litigation and that you did not know what it would cost you, or what trouble it was, that you concluded you had better take cash and quit? A. I did. Am not personally acquainted with Major E. A. Hoeppner. At the time I received my stock in the Pacific Oil Lands Company the only stock I knew anything about having been issued was my own. McMurtry did not consult me about the issue of the stock of this company, and I knew nothing about his intentions in that regard. Do not recall that Searls spoke to me about the incorporation of this company or the issuance of the stock. I had no knowledge as to what contracts or arrangements McMurtry made with anybody after the locations were made for the care, handling or preservation of the interests of the locators in these lands. I understood I had given him full right, power and authority to make any contracts he wanted for the development of any lands he located under the power of attorney and I had full confidence in him [218—

(Deposition of Charles W. Gardiner.)

111] and understood that it was the net results after expenditure or whatever money might be necessary that I was interested in. I expected to put up my share for the development, if the development proved satisfactory, if it was successful, if called upon.

Q. Yes, in other words, you mean if the lands were located and they looked good, you expected to put up your share to protect them; is that what you mean? A. Yes, sir. No, no one insured me against any expenditure, not that I know of. From 1908 to 1916, I lived at Batavia, and established my address at Chicago in November last year. After signing the power of attorney, saw Searls half a dozen times perhaps at Batavia. I was not in New York during that time. Have never been interested in any other located lands in California or elsewhere other than the lands located by McMurtry.

Redirect Examination.

Q. Did you ever learn that your name was used by Mr. McMurtry in making locations under this power of attorney in San Benito County, California?

A. Yes, sir. Q. When did you learn that? A. It is in that report. Q. Was that the first time you had known of that? A. I think it must have been. Don't know how many locations were made in my name in San Benito County. Don't remember that anyone ever told me.

Q. Do you know what became of your interest in the San Benito County lands?

(Deposition of Charles W. Gardiner.)

A. I believe they are still pending. Q. What interests do you [219—112] now claim in those San Benito County claims? A. Whatever interest I had, Mr. McMurtry will fully protect me. Q. What did Mr. Thorn say to you, if you can now remember, when he presented the ratification for your signature, Exhibit 7?

A. Mr. Thorn did not present it. Q. Who did present it? A. It came by mail, if I remember rightly. Q. I misunderstood you then when you said that you talked to Thorn about the ratification in some building here near the postoffice building in New York City? A. You must have misunderstood me.

Q. Upon your cross-examination you said there was a general understanding that McMurtry was to be compensated. With whom did you have that general understanding? A. Mr. Searls. Q. When was it that you had that understanding with Mr. Searls? A. I don't remember. Q. With reference to the time you executed the power of attorney, when was it? A. It was after that. Q. What did Mr. Searls say to you about it? A. I cannot remember what he said. I have set forth the purport of what he did say in my testimony. Q. What did you understand to be the compensation of Mr. McMurtry? A. It all depended upon circumstances. Q. What circumstances? A. The circumstances that might arise in the development of the location. Q. What circumstances do you refer to? A. Necessarily there must have been numerous expenses in

(Deposition of Charles W. Gardiner.)

furthering this location. I could not tell what they were. Q. Were you ever called upon to put up any money or means in [220—113] furthering these locations? A. No. Q. On your cross-examination, in answer to Mr. Ach, you said you were told that Mr. McMurtry was to finance the development work. Who told you that, and when? A. That was my general understanding in the beginning. Q. Was that told to you before or after you signed the power of attorney? A. My recollection is both. Q. By whom. A. By Mr. Searls. Q. Did you know at the time you signed the power of attorney how much you would have to put up for the development and annual assessment work upon each claim on which your name was used as a locator? A. I don't remember. Q. Did you know at that time what amount was required to be spent annually upon each of these claims upon which you were a locator? A. Not the exact amount; I knew in a general way. Q. Where did you get your information about that? A. I cannot tell you that, except that I know that they have to do a certain amount of work on any mining claim, general information. Q. If your name was located on January 1, 1909, on sixty locations, were you at that time prepared and willing to spend one-eighth of six thousand dollars each year to carry on the development work?

A. Yes. Q. At the time you signed the power of attorney, did you understand and were you advised that you might be obligated to put up the sum of

(Deposition of Richard B. Welch.)
$750 each year for annual assessment or development work on these claims? A. I don't remember. [221—114]

**Deposition of Richard B. Welch, for Plaintiff.**

RICHARD B. WELCH, called April 16, 1917, on behalf of the plaintiff, testified by deposition as follows:

I reside at West Haven, Connecticut. Clerk in the West Haven Water Company since November, 1910. In December 1907, resided in West Haven; was time clerk.

Q. The records of Kern County, California, discloses that there is therein recorded a power of attorney dated December 19, 1907 (substance of Exhibit 4 read to witness), are you the R. B. Welch who executed that instrument?

A. I signed several papers. I suppose I signed that.

Don't remember who requested me to sign it unless it was my brother-in-law, John B. Thickens.

Q. Did you have any conversaction with Mr. John B. Thickens about signing this power of attorney.

A. Not that I remember.

Q. Well, what, if anything, was said to you prior to the time you signed the power attorney, by Mr. Thickens? A. I cannot recall.

Q. Where were you when you signed it?

A. I cannot recall that.

Q. Were you in the city of New York?

A. I cannot say.

(Deposition of Richard B. Welch.)

Q. Did you appear before a notary public when you signed it? A. I cannot say that.

Q Why did you sign it?

A. I cannot recall why I signed it.

Q. You cannot recall that you did sign it?

A. I suppose that I did; I signed several papers, but I cannot recall that I signed this particular one.

Q. Why did you sign any papers in respect to this matter?

A. Why, I trusted to my brother-in-law and signed whatever he asked me to sign.

Q. What purpose did you have in mind when you signed these papers? A. Why, I don't know.

Q. Were you familiar with the laws of the United States at that time governing the location or the making of placer mining claims upon the [222—115] public domain of the United States?

A. I was not.

Q. At the time you signed this power of attorney, what was your intention with respect to exercising your rights under the laws of the United States, in taking up or locating upon the public domain?

A. I suppose I was locating a claim and that some day it would be worth some money.

Q. Where did you get any information which engendered that supposition in you?

A. From Mr. Thickens, I suppose, if I got any.

Q. When is the first incident with respect to this transaction that you can now definitely recall to mind?

A. You mean—will you repeat that question?

(Deposition of Richard B. Welch.)

Q. Do you know at this time how many claims you were located upon by reason of having signed this power of attorney? A. I do not.

Q. Did you ever know how many claims you were located upon? A. No, sir.

Q. Did you ever sign any papers that you can remember of in connection with these mining land transactions?

A. Some ratification papers, I believe, came to me and I signed them.

Q. Do you know what became of the power of attorney which you signed? A. I do not.

Q. Do you know what your attorney in fact, L. B. McMurtry, did under that power of attorney?

A. I do not.

Q. Were you ever asked to advance any money or means in the development of any mining claims on which your name was used as a locator?

A. I was not.

Q. At the time you signed the power of attorney, did you have any intention of advancing any money to be used in the development of or discovery of oil or other minerals upon any lands which might be located by the use of your name?

A. Why, if Mr. Thickens had said it was necessary for me to advance some money, I suppose I would.

Q. Did he ever say it was necessary for you to advance some money? A Not to my knowledge.

(Plaintiff's Exhibit with the deposition read in. It is a ratification similar in form to Plantiff's Ex-

(Deposition of Richard B. Welch.)

hibit 1 with the deposition of Frank B. Chapman and purports to have been executed by R. B. Welsh, August 19, 1910.) [223—116]

Q. I invite your attention, Mr. Welch, to a paper which has been marked Government's Exhibit 8; whose signature is that on there, the signature of R. B. Welch? A. That is my signature. Q. When did you sign that? A. Unless I was looking right at it, I should say on the 19th of August. Q. How did you come to sign that paper? A. I cannot tell you. Q. Do you know who presented it to you? A. I do not. Q. Can you, after reading Exhibit 8 recall now and relate to us the circumstances under which you signed that paper? A. I cannot. Q. Do you know how it came into your possession? A. I do not. Q. Do you know the stenographer or rather the Notary Carroll H. Brooks? A. Yes, sir. Where did he reside? A. I think he is in New Haven. Q. Do you remember of having gone before him and executing that paper? A. Yes, sir. Q. Was anyone with you when you executed that paper? A. I believe not. Q. Why did you execute that paper? A. It was sent to me by someone, and I suppose it was proper to sign it Q. At the time you signed it, did you read it? A. I should say so. Q. Did you know what it meant at that time? A. I should think I did. Q. Did you make any inquiry of anyone as to this contract between L. B. McMurtry and W. F. Herrin and others, of date August 4, 1910? A. I did not. Q. Did you ever, or had you seen that contract of August 4, at the time that you signed this

(Deposition of Richard B. Welch.)

paper? A. I had not. Q. Had you ever seen it? A No, sir. Q. At that time did you have any information whatever in regard to this contract of August 4th? A. Not that I can recall. Q. At the time you signed this ratification, did you know how many locations your name had been used in making? A. I did not. Q. Did you know at that time whether or not any public oil lands had been located by the use of your name? A. I suppose there had been. Q. Did you know where those lands were situated? A. I did not. Q. Did you know any thing about the state of development of those lands at that time? A. I cannot recall whether I did or not. Q. At the time you received [224—117] this ratification and executed it, was there any demand made upon you to advance any money or means to be employed in the development of any oil lands. A. Not that I recall. Q. Did you receive any compensation, money or anything of value for executing this paper? A. Not that I know of. Q. After the execution of the ratification, Exhibit 8 of this date, when [225—118] was the next time that you heard anything in regard to this oil land transaction? A. I cannot say definitely. Q. Did you have any conversation with Mr. McMurtry in regard to it? A. I did not. Q. Did you ever hear again from these oil land transactions after you executed the ratification? A. Why, I should say that I—from the company, you say? Q. Well, from anyone in regard to these transactions? A. In regard to that paper? Q. Well, yes, in regard to this paper, or in regard to any oil lands

(Deposition of Richard B. Welch.)

that had been located, or any transactions in regard to any oil lands that had been located, by the use of your name? A. Well, I heard I had other papers, but I cannot tell what they were. Q. I invite your attention to a check No. 163, dated, New York, September 11, 1911, drawn on the Second National Bank of the City of New York, made payable to the order of R. B. Welch, in the sum of $250, signed F. H. Searls on the face, and on the back of the check appears the following in typewritting: "Received from L. B. McMurtry, $250 in full payment for all my right, title and interest in and to all lands located by said L. B. McMurtry on my behalf, in Kern County, California, pursuant to a power of attorney made by myself and others to said L. B. McMurtry, bearing date the 19th day of December, 1907."

Right underneath that typewriting which I have just read appears the name, "R. B. Welch," "C. W. Thorn," and then the name of "F. H. Searls." Did you ever see that check before (showing witness)? A. Yes, sir. Q. When did you see it? A. I cannot give you the date. Q. How was it presented to you? A. I do not recall. Q. Do you know the person who presented it, or was it presented by mail? A. I think that came by mail. Q. Was there a letter accompanying it? A. That I cannot say.

That is my signature on the back of this check. As I [226—119] recall, I sent it to John B. Thickens.

Q. Why did you do that? A. Well, I suppose, I should say it came from him in a letter. Q. Well,

(Deposition of Richard B. Welch.)

did you get any cash on that check? A. I did not.

I do not recall that I received any money or thing of value for endorsing that check. Should say I read the typewriting on the back before I signed it. Cannot recall the next transaction or occurrence after signing this check.

Q. I invite your attention to Certificate No. 12, certificate of stock No. 12 of the Pacific Oil Lands Company, which is in the original book, or the stock certificate book of the Pacific Oil Lands Company, as produced by Mr. Brann here, which recites on its face that there was issued to R. B. Welch, and that R. B. Welch is the owner of 1000 shares of the capital stock of the Pacific Oil Lands Company. Do you know whether or not you ever received that certificate? A. I think I did. Q. Well, when was it that you received it? A. I cannot give you the date. Q. From whom did you receive it? A. I think that was—I cannot tell for sure—but I think that was received from Mr. Thorn. Q. Which Mr. Thorn? A. I cannot tell you that. Q. Was he an older gentleman or a younger man? A. An older gentleman. Q. To refresh your memory, was that Mr. C. W. Thorn, or Mr. Frederick Thorn. A. I should say C. W. Q. Was the certificate handed to you personally, or transmitted by mail? A. I think it came by mail. Q. Was there any letter accompanying it? A. Possibly there was. Q. Do you know where that letter is now? A. I have some letters. Q. Where are they? A. At home.

Q. Do you remember the contents of that letter?

(Deposition of Richard B. Welch.)

A. I do not [227—120] Q. Do you know why this certificate of stock in the Pacific Oil Lands Company was sent to you? A. I should say for a check that I signed? *A.* I suppose so. Q. How long did you keep this certificate of stock No. 12? A. That I cannot say. Q. I notice attached to the stub of this certificate in the original book a receipt which reads as follows:

> "Received certificate No. 12 for 1000 shares of Pacific Oil Lands Company, dated September 14, 1911. R. B. Welch."

Is that your signature on that (showing witness)? A. Yes, sir, that is my signature on that. Q. Do you remember when you signed that receipt I have just read? A. I do not. Q. Do you know what you did with it after you signed it? A. I do not. Q. On the back of the certificate No. 12 I find the following: "For value received ——— hereby sell, assign, and transfer unto Walter S. Brann ——— shares of the capital stock represented by the within certificate, and do hereby irrevocably constitute and appoint Walter S. Brann to transfer said stock on the books of the within named corporation, with full power of substitution in the premises." Dated March 16, 1914, and it is signed "R. B. Welch, in the presence of Clarence D. Horton." Is that your signature to that (showing witness)? A. Yes, sir. Q. Who was Mr. Horton; did you know him? A. Yes, sir. Q. Who was he? A. He is in the office with me. Q. What did you do with this certificate of stock after you signed it? A. That I cannot tell.

(Deposition of Richard B. Welch.)

Q. What did you receive, if [228—121] anything, when you signed this transfer of the certificate of stock? A. I cannot tell you that. Q. Did you receive any money at all? A. I do not remember. Q. On the back of it this purports to have been signed March 16, 1914; do you know whether or not that is the correct date on which you signed it? A. I should say so. Q. How long before you had signed it had you received this certificate? A. I don't remember. Q. At the time you signed the certificate, do you know how many claims had been located on the public domain in the State of California under the placer mining laws, upon which your name appears as a locator? A. I never knew. Q. Did you know at that time what interest you had, if any, in any oil claims that had been located by the use of your name? A. No. Q. The records of Kern County, California, show that on January 1, 1909, there were made the following placer mining locations on which the name R. B. Welch appears, together with the names of seven other persons, as locators, the claims being:

"Indiana," covering the northwest quarter of section 34;

"Maine," covering the northwest quarter of section 20;

"Rhode Island," covering the northwest quarter of sec. 22;

"Pennsylvania," covering the northwest quarter of sec. 26;

"Montana," covering the northwest quarter of

(Deposition of Richard B. Welch.)

section 32; all these being in township 31 south, range 23 east, and 19 other claims in Kern County, California, located at the same time.

Have you ever claimed any interest in any of the lands embraced in those locations? A. No, sir. Q. Do you now claim any interest in them? A. No. [229—122]

Cross-examination.

Married Mr. Thorn's sister June 16, 1906. Was then in the ticket office of the Boston & Albany Railroad, at Pittsfield, Massachusetts.

Q. In all of this matter concerning these oil land transactions you relied entirely upon what Mr. Thickens suggested to you, didn't you? A. Absolutely. Q. It is not true that Mr. Thickens applied to you to sign the power of attorney, and told you it was to locate lands in California, and that you might make a lot of money out of it? A. I should presume he told me that. Q. I notice you "presume" and "I think" a great deal in making your answers. Let me understand you. You now know that you signed a power of attorney and you signed a check and a ratification. Do you know that you got a check for $20, too, besides that? A. I should say that I did. Q. Up to the time of my asking you about it, had you entirely forgotten it? A. I had. Q. You had not mentioned it to Mr. Hall at all. Now, I show you a check dated January 8, 1914, bearing upon the back of it the signature "R. B. Welch"; is that your handwriting (showing witness)? A. That is. Q. Now, how did you get

(Deposition of Richard B. Welch.)

that check, do you remember? A. I think there was a letter that came from the Pacific Oil Lands Company, as I remember, and said that it was some distribution, and that was my share.

Mr. ACH.—Now, this check I offer in evidence, No. 1178. Q. Now, up to that time, up to the time of my interrogating [230—123] you about that, you had forgotten entirely that you had received a distribution by mail from the Pacific Oil Lands Company; is that true? Do you understand my question, after hesitation? A. I cannot understand quite about it. Q. Is it true that up to the time I showed you this check, this $20 check, with your signature on it, and while Mr. Hall was interrogating you, asking questions, that you forgot all about the Pacific Oil Lands Company, about their having sent you this check for $20 distribution? A. Why, I had forgotten it in here, but I had known about it before. Q. Before? A. Yes, sir. Q. You are a little bit nervous, are you? A. I am apt to be, I am sorry to say, yes. Q. Do you remember now signing any other papers at any time in this matter, or this transaction, besides the power of attorney, the ratification, and these two checks that have been shown to you? A. There was another paper attached to that check, which I signed, but I cannot remember all the papers I did sign. Q. You don't remember? A. No. Q. You don't remember whether that was a power of attorney or another location or acknowledgment of location, or anything of that kind, do you? A. I cannot tell you. Q.

(Deposition of Richard B. Welch.)

You don't know whether that was a consent to the formation of a corporation to hold these locations or not, do you? A. I cannot tell you. Q. You don't know anything about it? A. No, sir. Q. Now, I show you a piece of paper dated New Haven, August 14, 1913, and there seems to be a signature, R. B. Welch, [231—124] there. Look at it. Can you say whether C. W. Thorn witnessed your signature, if that is your signature,—is that your signature (showing witness)? A. Yes, that is my signature. Q. Do you know the notary public whose name is appended to that paper as having taken your acknowledgment? A. I did know him. Q. What is his name? A. Mr. Daggett. Q. Did you take it over to the Notary? A. Yes, sir. Q. Was Mr. Thorn over there in New Haven when you signed that paper? A. He was. Q. And you did talk with Mr. Thorn about it at that time? A. I should say I did. Q. And Mr. J. B. Thickens was not there at that time? A. He was not. Q. And when you signed that paper, did you give it back to Mr. Thorn, or did you mail it to San Francisco? A. I cannot tell you. Q. You cannot tell me? A. No, sir. Q. Well, now, read it, please? A. (Witness reads paper as requested.) Q. Have you read it? A. I have. Q. Do you now remember ever reading it before? A. I should say I did. Q. You will notice that that paper which you signed in August, 1913, gave Mr. McMurtry authority to appear at a stockholders' meeting of the Pacific Oil Lands Company, and to vote your stock; do you

(Deposition of Richard B. Welch.)

now remember that? A. Yes, sir. Q. Now then, you then knew that you had stock in that company, didn't you? A. I should say I did. Q. Didn't you also know that Mr. McMurtry had been your agent for the purpose of locating oil lands—and for other people—in California, before that? A. I should say so. Q. Are you friendly with your brother-in-law, J. B. Thickens? A. Yes, sir. Q. Did you see him frequently after you signed the power of attorney? A. That I could not say. Q. Don't you know how often you have seen your brother-in-law in the last ten years? A. No, I cannot tell you how many times. Q. No, but I want to know if you have seen him often? A. Not often, no. Q. Did he ever visit your house over there, or your home, in New Haven? A. He [232—125] has visited once. Q. Did you ever go over there to visit him, wherever he lives? A. Yes, sir. Q. When did you do it, in 1913? A. I cannot tell you. Q. Well, now, referring to this check which Mr. Hall had there a minute ago, made payable to you for $250, let me see whether I can refresh your memory in any way about it. Is it not true that Mr. Thorn brought you this check for $250 and at the same time called your attention to the fact that he was interested in some oil lands, or an oil company known as the Columbus Midway Oil Company, and suggested to you that it might be a good thing for you to buy 750 shares of this company's stock for $250—with that check—and didn't you get a certificate of stock in the Columbus Midway Company for 750 shares? A. I got

(Deposition of Richard B. Welch.)

a certificate for 750 shares of the Columbus Midway Oil Company. Q. And didn't you give him that check, after endorsing your name on it, in payment of that stock? A. I cannot tell you how I got the certificate. Q. What did you afterward do with that certificate for 750 shares of the Columbus Midway Oil Company's stock, didn't you afterward give it back to Mr. Thorn at the same time you gave him the stock in the Pacific Oil Lands Company? A. I gave the two certificates at the same time. Q. To Mr. Thorn? A. I cannot remember who I gave them to. Q. Is it not true in addition to that, when you gave up those two certificates, that you got $500 in money? A. I did. Q. And you had forgotten that when Mr. Hall asked you? A. I did not understand the question, the proposition. Q. You did get $500? A. I did. Q. Who gave it to you? A. I cannot tell you. Q. Well, at what place were you when you were given that $500 in money, Connecticut? A. In West Haven, I should say. Q. West Haven? A. Yes, sir. Q. What year was that, was it at the time you signed the back of that transfer in the stock book, in 1914? A. I cannot tell you. [233—126] Q. You cannot remember at all? A. No, sir. Q. Can you remember what was said to you at that time about it, why anybody was giving you $500? A. I suppose—Q. Can you remember what the party said who gave you the $500? A. No, I cannot. Q. You cannot remember? A. No, sir. Q. Do you remember anybody stating to you that the oil lands you were interested in, were

(Deposition of Richard B. Welch.)

involved in litigation, that the Government was trying to take them away, and here was your chance to get through with the thing for $500, or to take chances on the results; do you remember that being said to you by anybody? A. No, sir. Q. Have you ever been on the stand before in any case? A. No, not to my knowledge. Q. Have you a bad memory as a rule? A. Why, I cannot say as to that. Q. What? A. I don't know what you would call a bad memory. Q. Did you ever receive any other papers from the Oil Land Company in California that you remember of? A. I received my notification of the meeting. Q. Yes. A. And some paper that shows the condition of the Company. Q. Where is that? A. That is in West Haven.

Mr. ACH.—I offer in evidence this paper dated August 14, 1913, signed by the witness Welch, and witnessed in the presence of C. W. Thorn, and acknowledged before David Daggett, Notary Public, New Haven County, Connecticut.

(Defendants Exhibit "A" is similar in form to Plaintiff's Exhibit 5 with deposition of Frank B. Chapman.)

Q. I now show you a piece of paper comprising three sheets of typewriting, entitled "Pacific Oil Lands Company, First Report to Stockholders," dated January, 1914, in pencil, and in the upper left-hand corner the initials, "H. A." and "F. H." Kindly look at that paper and tell me whether you did not get that paper, or a copy of that paper with the $20 check. Read it over and take your time,

(Deposition of Richard B. Welch.)

unless you recognize it without reading it over (showing [234—127] witness). A. I should say I received that paper, a paper like that. Q. Now, Mr. Welch, have you been ill? A. No. Q. Your health good? A. Yes, sir. Q. You have not been ill at all? A. No, sir. Q. At any time? A. No, sir. Q. Been at work all the time steadily? A. Yes, sir. Q. This paper which you say you received with that $20 check—when you got this $20 check which I showed you there and you endorsed it, what did you do with it, did you cash it, or don't you remember? A. I don't remember. Q. You don't remember what you did with the money? A. No, sir. Q. Don't you remember what you did with the $500 Mr. Thorn gave you in money? A. Yes, sir. Q. Were you ever asked before by anybody what you did with the money? A. What money? Q. The $500. A. No, sir, not that I know of. Q. What? A. Not that I know of. Q. Did your wife ever get any part of it? A. Yes, sir. Q. What part of it did she get? A. She got it all. Q. Did you give her the $20 too? A. I may have. Q. Did you give her the shares of stock when you got those, too, did she take care of that for you, too? A. I cannot say. Q. When you gave Mr. Thorn that stock over in New Haven, or wherever you were, the two certificates, one of the Columbus and one of the other company, you got the $500, didn't you? A. I cannot say when I got that $500. Q. Didn't you get it when you gave up the stock to him? A. I cannot say that. Q. Do you know where you were when

(Deposition of Richard B. Welch.)

you got the money. A. I should say that I was in West Haven. Q. Was it in currency or gold? A. I should say it was a check. Q. What did you do with the check, give it to your wife? A. I don't know. Q. Or did somebody cash it for you, over there? A. I think it was cashed—I would not say cash—it was probably deposited. Q. In your name? A. In my name, yes, sir. Q. In the bank? A. In the bank. Q. Have you got a bank account now? A. Yes, sir. Q. How [235—128] about the $20 check, where did that go to? A. I should say it went in the same place. Q. Well, you understood when you got these moneys that it was because of your interest in these located lands out in California? A. I should say so. Q. You knew then that you had a claim then to some lands out in California? A. Yes, sir. Q. Now, in this report that you say you received when you got these checks, this $20 check, it was stated that Mr. McMurtry, as a last resort and fortunately, had made arrangements with the Associated Oil Campany, by which the Pacific Oil Lands Company, or rather by which the Associated Oil Company agreed to take over 1440 acres of land and to do all the work necessary to preserve the title to the land, and to pay McMurtry out of the oil produced from the land, if any, twenty cents per barrel. Now, as I read that to you, you having read it a little while ago in the presence of Mr. Hall and myself and the reporter, and others, other persons present, and having read it when you got it, do you now remember that you were in-

(Deposition of Richard B. Welch.)

formed in that paper that he had transferred to the Associated Oil Company 1,440 acres of land, and that the Associated Oil Company agreed to do all the work necessary in order to preserve the title to the land and pay out of the oil produced from the land, twenty cents per barrel, if they got any oil? A. I remember that; yes. Q. Didn't you understand at that time that that was referring to land which Mr. McMurtry had located in part in your name under the power of attorney that you had given at the request of Mr. Thickens, didn't you understand that? A. I don't know that I gave it any thought. Q. When you gave the power of attorney to Mr. Thickens, it is true, is it not, that he told you that this man, Mr. McMurtry, knew about oil lands in California? A. Yes, sir. Q. Is that so? A. Yes, sir. Q. And it is also true, is it not, that he told you at that time that Mr. [236—129] McMurtry as getting a number of people together, and he was helping to get a number of people together to locate oil lands in California for these people, if he should find any oil lands; is that not true? A. I cannot just remember what was said to me. Q. I am not asking you to remember just what was said to you, but did not Mr. Thickens imply to you that he was getting some people to locate lands in California? A. He did. Q. And didn't he say to you substantially—what is your name, Richard or Ralph, or Rudolph? A. Richard. Q. Richard—did he call you "Dick"? A. No. Q. Well, didn't he say, "Here, Dick, here is a chance to become a

(Deposition of Richard B. Welch.)

locator, and this man will locate in your name out there and you will have a chance to make some money out of it"? A. I got that impression. Q. And you were not trying to commit a fraud on the Government, were you? A. No, I was not. Q. You were not trying to help Mr. Thickens or Mr. McMurtry to perpetrate a fraud on the Government, were you? A. No, sir. Q. Did you think you were doing anything but what was your legal right? A. No. Q. You did not think you were going beyond your legal right, did you? A. No, sir. Q. Didn't your brother-in-law tell you that you had a right under the law to locate some land belonging to the Government for oil, and if you struck oil on it, you might make a big fortune out of it? A. I cannot remember what he said. Q. Didn't he say something about that to you? A. What? Q. Something about a chance of striking oil and making a lot of money out of it, and becoming a sort of "Coal-Oil-Tommy" or something of that kind? A. I cannot remember. Q. What? A. I cannot remember. Q. Well, he told you, didn't he, that he wanted you to sign this power for your own benefit so as to give you a chance? A. I should say so. Q. He didn't tell you to come and sign a paper so as to give another fellow a chance, did he? [237—130] A. No, sir. Q. He didn't tell you that he wanted you to sign a paper so as to give him, Thickens, a chance, did he? A. No, sir. Q. And he didn't ask you to sign a paper so as to give Mr. McMurtry a chance to make some money,

(Deposition of Richard B. Welch.)

did he? A. I should say not. Q. Now, in reading this paper over further, I see here that he stated that the making of this contract with the associated was the only thing to do to save what we now have; that there were many people whom Mr. McMurtry felt should be beneficiaries of this agreement which he had made; that there were the locators; that there were the people who had given money to aid in carrying on the work of holding the lands until they were sold; there were those who had worked and watched night and day to see that hostile parties had not jumped the lands and taken them away; there were men who had labored on the lands doing assessment work; and finally there was Mr. McMurtry himself, and Mr. Hoeppner, the first of whom had conceived and carried out the plan of getting and holding the lands, and the latter of whom had done yeoman's work in keeping off trespassers and jumpers. Do you now remember reading that at that time? A. I remember; yes. Q. And you did know that Mr. McMurtry had located lands and had a lot of trouble in holding those lands against fellows that were trying to take it away from him, when you read that paper? A. I should say I understand it that way. Q. You understand it that way now as I read it? A. Yes, sir. Q. And you understand what the effect of those words are, don't you? A. Yes, sir. Q. And you understand from my reading that Mr. McMurtry had a lot of trouble about these lands, and this company was corresponding with you in January, 1914, when they

(Deposition of Richard B. Welch.)

sent you some money as a dividend; is that not true? A. I remember receiving the dividend. Q. Well you remember now that they were telling you what this dividend came from and why [238—131] you were getting a dividend, don't you, in this report? A. I should say so. Q. Now, this thing reads further along as follows: "In order that all of these people should share in this contract with the Associated Oil Company, the Pacific Oil Lands Company was formed August 11, 1911, and its stock was divided up among the various people above named, or provision made to reimburse such as were given no stock." Now, as I read that, do you understand it? A. I don't quite understand it, no. Q. Well, I will read it again, and will read it very deliberately and slowly: "In order that all of these people should share in this contract with the Associated Oil Company, the Pacific Oil Lands Company was formed in August, 1911, and its stock was divided up among the various people above named, or provision made to reimburse such as were given no stock." Now, you understand when he says that "all these people" he means the locators and the men who helped them protect the lands, Mr. McMurtry doing his work, and Mr. Hoeppner, who had done yeoman's service—the men had done the assessment work—you remember my reading all that a minute ago, don't you? A. Yes, sir. Q. Do you understand it now? A. I think so. Q. Yes. Now, he says: "In order that all these people should share in this contract with the Associated Oil Com-

(Deposition of Richard B. Welch.)

pany"—you remember my reading about his saying that he had fortunately made a contract with the Associated Oil Company so that they would agree to protect these 1440 acres; do you remember my reading that? A. Yes, sir. [239—132]

Q. And you remember your reading it in this contract a few minutes ago—not the contract—in this report a few minutes ago when I asked you to read the report here, just a few minutes ago; can you remember reading it? A. I cannot say that I read it all; I just glanced at it. Q. Well, now, this paper proceeds to say, in order that all of these people should share in this contract with the Associated Oil Company, this Pacific Oil Lands Company in which you had stock was formed in August, 1911, and this stock was divided among the people above named, or provision was made to reimburse those who were given no stock. To this company McMurtry transferred the contract with the Associated Oil Company, or rather to the Associated— Mr. Hall.—With the Associated? Mr. ACH.—Yes. Q. "Covering 1440 acres of land, and 640 acres of land in San Benito County, and the stock of this company went to those who had contributed in any way in getting and holding the land." Do you understand that language as I read it to you? A. I think so. Q. Now, when you looked at it a little while ago did you see that provision in the report? A. I don't know that I read it at all. Q. Yes. When you got it you read it and you read everything that was in this, didn't you? A. I should say perhaps I did. Q. And you

(Deposition of Richard B. Welch.)

understood it then, didn't you? A. I thought I understood it. Q. Well, now, you understood then from this paper that you were one of the locators; that he had located these lands; that he had made a contract with the Associated Oil Company whereby they did all the work that the law required in order to protect the lands; that they had a lot of trouble about the lands, keeping off jumpers; that Mr. Hoeppner had helped a lot; that the assessment work had been done and that there had been prior locators; that he thought it was only fair and equitable [240—133] that everybody should participate in that contract, and therefore he organized this corporation and divided the stock up of that corporation to these various people, yourself included, as a locator. Didn't you understand that? A. I should say so. Q. And didn't you get a dividend right with that report? A. I got a dividend, but I don't know whether it was that one or not. Q. I understood you to say that the report came with your check for $20.00; do you remember that now? A. I can't remember what came with the check. Q. I see. Now, see if I cannot refresh your memory a little more. I am showing you a paper now which reads like this: "PACIFIC OIL LANDS COMPANY: I, the undersigned, stockholder of the Pacific Oil Lands Company, a California corporation, with its principal place of business in the City and County of San Francisco, State of California, do hereby consent that the Board of Directors of said corporation may set aside $20,000 of the cash assets of said corporation

(Deposition of Richard B. Welch.)

to be declared as a dividend upon the stock of said corporation, and such other sums from time to time as in their discretion may seem advisable; and I hereby release the Board of Directors of said corporation from all liability of every kind and character in so doing." Now, please look at it and see whether that is your signature. A. That is my signature, yes, sir. Q. Now, did you hear me read that paper to you just now? A. Yes, sir. Q. Did you understand it as I read it to you? The witness hesitates and appears to be reading the paper again, and I ask him again—I ask you again—did you read the paper again yourself? A. I have not read it all, no. Q. will you please go on and read it again yourself, and say, "I am through," after you have read it. Read it slowly, calmly and carefully, please. A. (Witness reads paper as requested.) Q. Have you read it now? A. Yes, sir. Q. Now, do you understand it? A. I think I do. [241—134]

Q. (Question read.) A. I cannot say that I did. Q. Now, when you signed this power of attorney, you did not give your brother-in-law or Mr. McMurtry or anybody else any writing that they could use your name to get lands from the United States Government for their benefit, did you? A. I don't think I did.

Cannot remember signing any contract or agreement to turn over any lands that were given me by virtue of that power of attorney to McMurtry, Thickens or anybody else; nor can I remember anyone asking me to.

(Deposition of Richard B. Welch.)

(Defendant's Exhibit "B" offered and read in evidence and is similar in form to Plaintiff's Exhibit 6 with the deposition of Frank B. Chapman, and dated December 12, 1913.)

Q. This writing that you got, the report from the Pacific Oil Lands Company, when you got that dividend, also said that they had changed the agreement with the Associated Oil Company, and by the new agreement the Associated Oil Company agreed to pay to the Pacific Oil Lands Company, in which you held this stock, $1,375,000, in cash, down, it says and the balance in monthly installments of $20,000 a month. Do you remember reading those big figures in this report? A. Yes, sir. Q. What? A. Yes, sir. Q. And do you [242—135] remember that it went on and said: "This contract for the first time gave the company an assured definite amount available, and left only one opening by which future payments shall be defeated. That is, if the Government shall take away the land sold, that payments under the contract stop from the date of such taking away, and there is no further obligation on the part of the Associated Oil Company, to make any more payments." Do you remember that now, that that was all underscored (showing witness)? A. Yes, I see. Q. And do you remember that Mr. McMurtry, or whoever wrote this report, was calling the attention of the stockholders of the company that they had received this large sum of money on this contract, and there was $20,000 of payments to come in every month, but there was danger that the Government of the United

(Deposition of Richard B. Welch.)

States might succeed in taking the land away from everybody, and then the payments would stop. Now, don't you remember that now? A. I should say that I did. Q. And you knew when you read that, if the Government or anyone should take that land away, it was supposed to affect you and your rights, didn't you? A. I should think I did. Q. This paper also said, that is, this report of January, 1914, "In this connection it is well to state that up to the present time no title to any of the lands sold has been obtained from the Government." Do you understand that language, that no title to any of these lands that were located and sold, by them to the Associated Oil Company, had ever been gotten from the Government; do you understand that? A. I don't think so. Q. Did you understand it then? A. As I said, I read the paper and I did not give it any thought. Q. But you understood what you read? A. I think so. Q. And you understand English? A. Yes, sir. Q. And this paper was plain to you, you didn't have to go and ask anybody what it meant, did you? A. No. Q. Did you ever read it over with your wife? [243—136]

A. I don't remember. Q. Now, when the man came with the $500 check is it not true that he told you that there was some question being raised by the Government about these lands, and that you could have $500 in cash for your interest, or you could hold your interest and take a gamble upon the outcome of the claims of the Government; is that not true? A. I cannot remember. Q. You won't testify

(Deposition of Richard B. Welch.)

that that did not occur, will you? A. I cannot remember whether it did or did not. Q. Did you have any talk with your brother-in-law, Mr. Thickens, about whether you should sell this stock or not, or do you remember whether you did or that you did not? A. I do not. Q. You may have and not remember it; is that the idea? A. I may have. Q. Did you ever debate it—do you know the meaning of the word "debate"—to debate it? A. Yes, sir. Q. Did you ever debate it with your wife before selling the stock for $500? A. I don't think I did. Q. Let me ask you: Did you ever own any other stock in any other corporation besides this in the Oil Lands Company? A. No, sir. Q. Before you bought the stock from Mr. Thorn in the Columbus Midway Company, with the first $250 you got out of these locations, did you advise with your brother-in-law, Mr. Thickens, as to whether you should buy that stock or not? A. No. Q. Did you rely entirely on Mr. Thorn and what he said about your buying the stock; do you understand my question? A. I should say that I did. Q. Did you at the time you bought the stock in the Columbus Midway Company, from Mr. Thorn, advise or consult with your wife as to whether you should buy that stock or not? A. No, I did not. Q. Did you act upon your own judgment in the matter? A. I should say so. Q. Well, do you remember what hopes of enhancement in value of the stock or advance in the value of the stock, or in making money by buying the stock, that Mr. Thorn held out to you, when he got that $250 check from you?

(Deposition of Richard B. Welch.)

A. I do not. Q. He did tell you something, didn't he? A. I don't know what he did tell me. [244—137] Well, you were not making Thorn a present of that $250, were you? A. I don't think I was. Q. You thought you were getting something worth as much as or more than $250, from what he said, is that true? A. I should think so. Q. You told Mr. Hall, as I understood you, that you did not know where the locations were made, which means that you did not know where the land was which is mentioned in this report, or in these proceedings that he has been asking you about— Now, it is true, is it not, that you knew these lands were in California. A. I knew they were in California. Might have asked Thickens about this matter after signing the power of attorney. Should say that I required of him in some way about it. I should say he told me that it was being taken care of by Mr. McMurtry. Don't remember that I advised Thickens as to whether I should sign any of these papers. No, did not give this $520 back to McMurtry or Thorn.

Redirect Examination.

This $500 which I received when I surrendered the Pacific Oil Lands Company's certificate of stock and the stock in the Columbus Midway Oil Company, and the $20 dividend check is the only money or thing of value that I received in connection with this entire transaction. Am still unable to recall where I signed the original power of attorney. Cannot recall having appeared before the Notary Public or Commissioner of Deeds in the City of New York and

(Deposition of Richard B. Welch.)

signing these papers. Cannot say where I was in December, 1907. Cannot remember having been in New York City during that month. [245—138]

**Deposition of Julian P. W. Richmond, for Plaintiff.**

JULIAN P. W. RICHMOND, a witness called April 18, 1917, on behalf of the plaintiff, testified by deposition as follows:

Am a civil engineer and reside at Yonkers, New York. Am employed in New York City and have been for over ten years. Was employed there in December, 1907, as assistant engineer for the city, as I am now. Never lived in or visited California; nor have I ever been engaged in actual mining.

Very likely I signed the power of attorney (Plaintiff's Exhibit 5), but I don't remember it distinctly. Don't recall knowing John G. McTigue, Notary Public, but remember having appeared before a notary to execute an instrument. The connecting link between myself and that document is a Mr. C. W. Thorn, who was a comparatively old acquaintance of mine; he was indebted to me for money loans and other reasons, and interested me in this location. Don't remember what he said. My impression of his meaning was that by enabling me to become a collector of such claim he could repay. He made no direct reference that my participation in this would be a benefit to him, and in that way he could repay me; the inference was that he was doing me a good turn, that he was leading me to a profitable investment. I had heard of McMurtry

(Deposition of Julian P. W. Richmond.)

on many occasions previous to this execution, to the best of my recollection. Do not know that I met Mr. McMurtry before executing the power of attorney. Believe I was interested in a corporation with which McMurtry and Thorn were connected. Don't remember its name, but can guess. My best guess or impression is that it was the Empire Oil Company. Don't remember that I had more than one conversation with Thorn about executing this power of attorney. Don't remember whose office I was then in, but the place was at Fulton Street and Broadway. There were present some other acquaintances of Thorn, his son, I believe, and probably Mr. Freeman, and others whom I have forgotten. [246—139] Don't recall what was said to me at the time by either Mr. Thorn or the notary public —nothing that made an impression upon me. After signing it Mr. Thorn kept in touch with me at irregular intervals concerning the transaction. In a general way, he told me that the location of wells was being prosecuted upon this property and that the outlook was rosy for actual returns.

I don't remember that anything was said at the time I signed as to any financial liability I would incur. I cross-examined or questioned Mr. Thorn regarding certain features of this power of attorney. One of those was whether my giving the power of attorney to anyone regarding my privilege of locating mines or similar properties would be estopped in regard to further locations. The question was whether this particular document pre-

(Deposition of Julian P. W. Richmond.)

cluded me from locating at other times, or in other places; in other words, I wanted to know how much this particular power of attorney bound me, and I was told that it bound me, as near as I can recall, only for the State of California, and I think it only bound me for a term of years, and that was the impression I received from Mr. Thorn. What I assumed I knew was that if development should take place, similar to all mining claims, that one or more of the locators who established himself upon the property, plotted it, surveyed it, recorded a deed for it, and spending a certain amount of labor and probably money upon it, within stated periods, the regular routine, which I seemed to always know of. Don't remember that anything was said at the time I executed the power of attorney or before as to what would be my liability, from a financial standpoint, by reason of having executed it.

(Plaintiff's Exhibit 9, which is a ratification similar in form to Plaintiff's Exhibit 1 with the deposition of Frank B. Chapman, and purporting to have been executed by Julian P. W. Richmond August 16, 1910, offered in evidence.) [247—140]

To the best of my recollection this document (Plaintiff's Exhibit 9) was executed by me at the suggestion of Mr. Thorn. My recollection of events at that time remains very vague. I would rather not be pinned down to this document, and make my answers regarding dealings with Mr. Thorn in general. I signed it then because I had previously

(Deposition of Julian P. W. Richmond.)

signed a power of attorney, and I understood that this document was a ratification of the previous power of attorney. Got this understanding from Mr. Thorn's statement and my interpretation of this instrument (Exhibit 9). I certainly read it. I cannot answer that question fully, as to whether I was then advised as to the contents, purport and effect of the contract made by L. B. McMurtry as my attorney in fact, with W. F. Herrin and others, dated August 4, 1910. Don't remember whether this contract was exhibited to me at any time. I believe at the time I signed this paper (Exhibit 9) I was a *bona fide* locator in the State of California for some oil claims. It was my impression that my power of attorney for locating claims was limited by law to a single claim and that I had completely exercised those powers in the original power of attorney executed to Mr. McMurtry. Q. At the time you executed Exhibit No. 9, you had this understanding to which you refer in your last answer, did you not? A. It was a mental understanding with myself. Q. And you had it at the time you executed Exhibit No. 9? A. I don't remember, I don't remember. Q. At the time you executed Exhibit No. 9, the ratification, what did you understand was the extent or area of mining claims? A. I don't remember any dimensions. I understand that those claims are, are a matter, that the size of those claims are regulated, and this was a standard claim. Q. How many claims, if any, were you interested in—were you claiming an interest in? A. At the

(Deposition of Julian P. W. Richmond.)

time I executed— Q. Exhibit No. 9? A. I don't remember. Q. Did you know at that [248—141] time how many claims you claimed to be a locator upon? A. I was satisfied in my own mind that this was a ratification of the original power of attorney, disposing of the original claim. Mr. HALL.—Read the question again to the witness, and I ask him to note it carefully, and to give an answer to it. (Question read.) A. I then believed that I did know. Q. Do you know now how many claims you then thought that you were located on? A. Repeat that, please. (Question read.) A. The matter has passed my mind. Q. You have used the word or words, "one claim"; what did you mean by that? A. I mean the legal limitation which a locator is bound by. Q. Did you know at the time you executed Exhibit No. 9 how many location notices of association placer mining claims your name appeared on in the State of California as an associate locator? A. I did not inquire. Q. Did you know how many association locations your name appeared on? A. I don't remember. Q. At the time you signed Exhibit No. 9, did you receive anything of value for signing it? A. I don't remember. Q. What was the next paper or instrument that you signed, after you executed Exhibit No. 9? A. I don't remember. Don't remember whether I had any stock in the Empire Oil and Development Company at that time. Don't remember that I ever had any stock in that company. Q. Had you acquired it

(Deposition of Julian P. W. Richmond.)

before or after you executed the original power of attorney?

The WITNESS.—Can I say anything apart from the record?

Mr. ACH.—Say anything you want.

The WITNESS.—Gentlemen, it is simply this: That I have not been in touch with any one of you, no one in this room have I seen before Monday, and I am entirely at sea as to these things; you have to go over this thing slowly and have a little patience, and you will have to refresh my memory on each one of these things. Now, you speak of a power I made and acknowledged prior— Q. Well, [249—142] prior to the time—I will just change that: Had Mr. C. W. Thorn, or Mr. L. B. McMurtry, or Mr. F. H. Searls sold you any stock in any oil company prior to the time you executed the power of attorney in December, 1907? A. Mr. Thorn has pledged with me on several occasions many shares of oil stock. Q. Have you purchased outright and were you the owner, either by purchase or by condemnation of pledge, any stock? A. Please limit these stocks to certain ones which have to do with your question. There are many oil stocks in the market. Q. Did you have any stock in your possession of which you were the owner in the Empire Oil & Development Company prior to the time you executed the power of attorney in December, 1907? A. Please go back and tell me which is the Empire Oil & Development Company, who are its officers or something more definite about that com-

(Deposition of Julian P. W. Richmond.)

pany; I am mixed up with these different companies. Q. As near as I understand the situation, it was a company of which Mr. L. B. McMurtry was either the president or some other officer, and the stock of which was being sold in New York City in 1907— A. Previous— Q. By Mr. C. W. Thorn. A. Previous to this power of attorney? Q. Yes. A. Previous to any one of the documents here mentioned? Q. Yes, previous to the execution of any of the documents. A. I don't remember purchasing any such stock. Nor had any such been presented to me. I hold at present certificates which are probably the Empire Oil & Development Company, stock certificates of the Empire Oil & Development Company. Q. In what way and for what purpose do you hold them? A. As collateral to a loan to C. W. Thorn.

Q. I invite your attention now, Mr. Richmond, to a check, No. 172, dated New York, September 11, 1911, drawn by F. H. Searls on the Second National Bank of the City of New York, made payable to your order, Julian P. W. Richmond, for the sum of $250, and on the [250—143] back thereof is the following, in typewriting:

> "Received from L. B. McMurtry, $250.00 in full payment for all my right, title and interest in and to all lands located by said L. B. McMurtry, on my behalf, in Kern County, California, pursuant to a power of attorney made by myself and others to said L. B. McMurtry, bearing date the 21st day of December, 1907."

(Deposition of Julian P. W. Richmond.)

And just below that is signed the name, "Julian P. W. Richmond," and below that is the name of "C. W. Thorn," and below that is the name of "F. H. Searls," and then below that is a rubber stamp, which is immaterial, a bank rubber stamp.

C. W. Thorn presented it to me. Very likely I read the typewriting on the back before signing it. I received $250.00 United States currency on that check from C. W. Thorn, and there were delivered to me at that time stock certificates; don't remember in what company. Don't remember whether it was the Empire Oil & Development Company or the Columbus Midway Oil Company.

Q. What consideration, if any, did you pay for the stock certificate that was delivered to you at the time you signed your name on the back of check No. 172? A. If my memory were properly revised I could answer this question easily, but I don't remember the names nor other details of the oil stock certificates involved in this questioning. Q. Did you take the $250 that Mr. Thorn paid you in currency when you signed your name on the back of check 172 and give it to him or to any other person, in payment for the stock certificate which was delivered to you at the time you signed check 172? A. I don't remember. Q. What did you pay, if anything, for the stock certificate which was delivered to you at the time you signed check 172? A. I don't remember. Q. Did you pay anything at all? A. I don't remember. Q. Why was check 172 given to you to sign? A. The check was not

(Deposition of Julian P. W. Richmond.)

given to me to sign. Q. Why was it given to you? A. I don't remember. Q. Who presented it to you? [251—144] A. Mr. Thorn brought the check to me.

Don't remember that he said anything to me. Being out of touch with this matter for nearly six years, absolutely out of touch with this particular check for six years, I cannot remember anything very definite regarding it. What I can tell you in this particular definite matter is vague. I understood—I understand—according to that—I understand now that my impression at that time was that Mr. McMurtry was consummating a deal for which it would be necessary to have control of the interest of his colocators, or the interest of the locators of the claim in which I was a locator.

Q. At the time you signed that check, did you know how many claims your name had been used in locating? A. That question does not mean anything to me. Mr. HALL.—Will you please repeat the question to him, Mr. Stenographer? Q. (Question read.) A. I cannot answer that. Q. At the time you signed check 172 did you know how many placer mining claims had been located in the State of California by the use of your name? A. I did not know by number. Q. Do you know by description or any other way? A. Not by technical description, or by any other technical way. Q. By any way other than a technical way or technical description, do you know? A. I was then impressed with the fact that I had located such claims. Q.

(Deposition of Julian P. W. Richmond.)

How many? A. I had previously stated that I thought that there was a legal limitation to the size and number of such claims located by any individual. And that impression still stood. Q. At the time you signed check 172, how many claims did you think that you had located? A. I did not think at that time. Q. (Question read.) A. Particularly upon the number of claims. Q. Hal you any information or idea as to the number of claims upon which your name had been used in making locations? At the [252—145] time you signed check 172? A. I had a general idea that I had located as large and as important a claim as I legally could. Q. What was your idea as to the extent and area of the claim which you then located? A. My idea was that it was a maximum claim allowed under the law. Q. What was the source of this information as to the extent and area of the claim which you had located? A. My own general knowledge. Mr. HALL.—Read the question again. I insist it is not responsive. A. I will go on record as saying that I did not bother about the size of the claim. A claim was a claim to me. Don't remember that any explanation was made or anything said to me about the typewriting on the back of check 172. Very likely I read it. Don't remember what I thought I was doing when I signed that typewriting on the back of that check.

Q. Did you know at that time of what all your right, title and interest in and to all lands located by said L. B. McMurtry on your behalf in Kern

(Deposition of Julian P. W. Richmond.)

County, California, consisted? A. Outside of its money value, I did not know. Q. What did you know its money value to be? A. I believed its money value to be very small. Q. Can you fix that in dollars and cents for us? A. My answer is that I had had these various oil companies investigated and had come to the conclusion that their stocks were nearly worthless, so that when Mr. Thorn offered me payment for a stock certificate of a company whose name I don't remember, it is very likely that I accepted this check and another stock certificate for the transfer of a stock certificate in my name for shares in a company whose name I don't remember. Q. Was this check No. 172 given to you in payment of the transfer from you to Mr. Thorn of a stock certificate in some oil company, or was it given to you for the purpose recited by the typewriting on the back of the check? A. The answer is, [253—146] probably a combination of those purposes. Q. At the time you received check 172, was there anything said to you by any person with respect to any payments that would be made to you in the future by reason of your having executed the power of attorney in December, 1907? A. I don't remember. Q. I invite your attention now, Mr. Richmond, to certificate No. 28, found in the original stock book of the Pacific Oil Lands Company, which discloses that on September 1, 1911, there was delivered, rather there was issued to Julian P. S. Richmond, certificate No. 28 for 1,000 shares of the capital stock of the Pacific Oil

(Deposition of Julian P. W. Richmond.)

Lands Company. I also invite your attention to a receipt attached to the stub of the certificate No. 28, which receipt reads as follows: "Received certificate 28 for 1,000 shares of Pacific Oil Lands Company stock, dated September 12, 1911." That is signed "Julian P. W. Richmond." Is that your signature on that receipt (showing witness)? A. That is my signature. Q. When did you receive certificate No. 28? A. It is most probable that I received certificate 28, of record here, September 12, 1911.

Don't know who delivered certificate No. 28 to me, or whether it was delivered by some person or by mail. I knew at the time why it was delivered to me, but don't remember now. If this certificate is a certain certificate which I have in mind, it was delivered to me because I was one of the colocators of a certain claim. Don't know what claim it was or where, only that it was in California. Don't remember any of the circumstances attending its delivery to me, or how long I kept it. That is my signature on the back of the certificate. Don't remember when I signed that. The occasion for signing was that I received other good and valuable consideration therefor. Don't remember what or from whom I received it. The fact that "Walter S. Brann" appears to be the transferee does [254—147] not recall to my mind from whom I received the consideration. After endorsing the certificate I must have given it in exchange for something. Don't know to whom. I believe I gave it in exchange for other stock. Don't remember the next paper I signed.

(Deposition of Julian P. W. Richmond.)

(Plaintiff's Exhibit 10 read in evidence. It is a proxy similar in form to Plaintiff's Exhibit 5 with the deposition of Frank B. Chapman, and purports to have been executed by Julian P. W. Richmond, August 12, 1913.)

It is too bad that everything I have to say goes on the record. I have other things to remember than every little piece of typewriting that I signed. (After reading.) I signed many such proxies and signed that proxy. C. W. Thorn probably presented that to me for my signature. He may have sent it to me by mail. I think I interpreted it myself. May have talked with C. W. Thorn about this proxy but do not recall the details of the conversation. Signed it for the same reason that proxies are usually signed—for the reason of inability or disinclination of the principal to perform the work delegated to the proxy.

(Paper offered in evidence as Plaintiff's Exhibit 11 in connection with this deposition. It is a consent to declare dividends similar in form to Plaintiff's Exhibit 6 with the deposition of Frank B. Chapman.)

I believe that paper (Exhibit 11) which I signed came through the mail. Believe I received this paper which bears the title "Pacific Oil Lands Company," also "First Report to Stockholders," dated January, 1914; don't remember when I received it or when with reference to the time I signed the consent to the distribution of the $20,000 dividend on January 7, 1914. Very likely I read

(Deposition of Julian P. W. Richmond.)

this report at the time I received it. Don't remember whether I received any money or thing of value after signing this consent to the [255—148] dividend distribution.

Q. I now invite your attention to check dated San Francisco, 1/12/14, No. 1206, drawn on the Bank of California, National Association, San Francisco, made payable to the order of Julian P. W. Richmond, in the sum of $20.00, signed Pacific Oil Lands Company, F. E. Harrison, Secretary and Treasurer; L. B. McMurtry, Vice President; and bearing on the back thereof the following endorsement in writing: "For deposit, Julian P. W. Richmond," and underneath that "Julian Richmond," and other rubber stamps of banks apparently. Will you please examine that check (showing witness)?

A. That is my endorsement. I received and cashed that check, but don't remember from whom. Don't remember that I received any money after receiving this check for $20.00.

Q. Do you know whether or not you received this check for $20.00 because you had signed the power of attorney in December, 1907? A. I do not believe so. Q. Why do you think you did receive it? A. I believed it was a *bona fide* dividend.

This check was deposited in my own bank January 20, 1914. Don't remember whether that was before or after I surrendered certificate No. 28 in the Pacific Oil Lands Company, or whether I

(Deposition of Julian P. W. Richmond.)

have any interest in that company. Don't know whether I have any stock certificate. Don't think I have any Pacific Oil Lands Company stock at present.

Q. Can you now tell me how much money you received by reason of the fact that you signed the power of attorney on December 21, 1907, appointing Mr. McMurtry as your attorney in fact for the purpose which I have theretofore mentioned. A. I don't acknowledge having received money from Mr. McMurtry. Q. How much money have you received from any person or any corporation, or any persons, or any corporations, or any other sources whatsoever, by reason of the fact [256—149] that you signed a power of attorney on December 31, 1907, constituting Mr. McMurtry your attorney in fact for the purpose I have mentioned? A. I don't know that I received any money for any purpose so mentioned, and I don't know what sums of money I received from any persons or corporations mentioned. Q. What sum or sums of money, if any, have you received from Mr. McMurtry, or any other person, or any persons or corporations by reason of the fact that Mr. McMurtry, acting as your attorney in fact, used your name in the locations of placer mining claims on the public domain in California? A. I don't remember receiving other sums than those indicated by the two checks shown to me to-day. Q. To refresh your memory, Mr. Richmond, didn't you receive the sum of $300.00 from Mr. C. W. Thorn

(Deposition of Julian P. W. Richmond.)

at the time you surrendered certificate No. 28 in the Pacific Oil Lands Company? A. I don't remember receiving money from Mr. Thorn at that time. Had received money from Mr. Thorn, but do not recollect the purpose. Q. Was any report ever made to you by any person of the transactions surrounding the location of the public domain in the State of California, in making placer mining locations in which your name, Julian P. W. Richmond, appears as a locator? A. My answer is, I believe I received reports of progress upon such locations. Believe I received verbal reports and reports in typewriting by mail. Believe I made inquiries verbally of Mr. Thorn at the time I signed check No. 172, regarding the development of the locations in which I was interested. Learned that such development was progressing, that Mr. McMurtry was personally present, and had set drilling rigs. Did not inquire as to the description of the claim or claims upon which McMurtry had set up drilling rigs—believe that to be of record.

Q. Do you know the description of the claim or claims upon [257—150] which Mr. McMurtry had set up drilling rigs? A. I was not interested, as I thought then that a locator's claim was restricted by law to a certain area or quantity, and that I had located the full extent or limit of such law.

Have not instituted any action at law against L. B. McMurtry. I have the matter in mind. Have not sought any legal advice on the question or discussed it with anyone.

(Deposition of Julian P. W. Richmond.)

Cross-examination.

I cannot tell whether I ever have met L. B. McMurtry. Was never in San Francisco. Have no recollection of ever going to the Knickerbocker Hotel to meet anyone in connection with this transaction in California. Very probably I talked with the person who gave me this check No. 172 of $250.00 concerning giving it to me. Cannot tell whether I am friendly with Thorn now. Have had no disagreement with him. The name of the Columbus Midway Oil Company is familiar to me. [258—151]

Q. Did this Special Agent, when he took the statement which is referred to by Mr. Hall, in his remarks, swear you, or do you remember whether he did or not? A. I don't remember.

The statement was made at my home in Yonkers, New York, where I believed the writing was done. He came and saw me while I was in quarantine on account of infantile paralysis. I was extremely agitated in mind at that time. Yes, before he left I had an understanding of the motive of his call. He was at the house possibly an hour. Am an office employee of the city of New York. Visit and inspect construction work, but do not direct it. "My work is of this nature, that I write or assist in writing the reports regarding construction of the Catskill Aqueduct, which are published, and also I very often interview representatives of the press, give information to inquirers, give public lectures, and act a little bit of a publicity man." In the office

(Deposition of Julian P. W. Richmond.)

of the Board of Water Supply.

Q. You said something about your necessity of remembering other things besides pieces of paper to which you had appended your signature. Have you been engrossed in the work in which you have been engaged in the last year or two? A. I have other activities besides this position with the city. Q. And what is it, then? A. I am interested in another business. Q. Might I inquire? A. It is the sale of a patented article which bears my name. Q. Being what? A. Called the Richmond screw anchor. It is a form of expansion bolt, if you wish. I have men to whom I pay salaries for selling that article. Q. And how long have you been engaged in that business? A. For a number of years. Q. Have an office in New York City, too, have you? A. Yes, sir. Q. Did you have any agreement or understanding, express or implied, of any kind or character, that your name was to be used [259—152] as a locator for the benefit of anybody else at the time or would be at the time you gave your power of attorney, and by that I mean whether you had agreed in any way in your name that your rights could be used for the benefit of Mr. McMurtry, or any person, firm or corporation? A. I had no understanding that my name would be used to an undue extent for the benefit of others than myself. Q. In the matter of the location of lands, is it not true that no person ever suggested or insinuated to you that they were to have any interest in any lands that were located for you in your

(Deposition of Julian P. W. Richmond.)

name? A. I understood that I was a copartner in the location. Q. Yes. You mean a copartner with your other locators? A. With the other locators, yes. Q. Now, is it not a fact that Mr. Thorn was trying to convince you at the time you executed this power of attorney, and before, that he was giving you an opportunity by these locations, or by giving authority to some one else to locate for you, giving an opportunity to you of possibly to make some money in oil or oil lands out in California? A. Mr. Thorn was indebted to me, and still is, and I consider that he presented to me an investment opportunity. Q. Is it not a fact that Mr. Thorn told you that Mr. McMurtry had in view some lands or a section of the country out in California, where he thought he might be able to locate some lands that might produce oil? A. I am not sure that Mr. McMurtry named or mentioned that. Q. The power, you will recall, ran to Mr. McMurtry? A. I recall.

Have not given this matter any considerable thought since was interviewed by Special Agent Favorite. Have no definite recollection as to how I disposed of certificate No. 28 for 1,000 shares of Pacific Oil Lands Company stock.

Q. Does the asking of this question refresh your recollection: [260—153] That you were interviewed by Mr. Thorn, Mr. Searls—both Mr. Thorn and Mr. Searls—and told that the lands covered by these locations were being claimed by the Government and that it was an opportunity for you to get

(Deposition of Julian P. W. Richmond.)

$500 in cash for your interest and your stock, and that you could either take $500 or take your chance on the result? A. I recollect a discussion with Mr. Thorn upon that broad matter; I do not recall the sum stated. I recall that at the time of giving up my stock certificate No. 28 and the Columbus Midway stock certificates, that I received coin or currency from Mr. Thorn, but I don't remember what other transaction took place without having my memory refreshed.

My father-in-law is an employee of the Standard Oil Company, and has been all of his life. He knows the editors of many oil papers, and I told him of the interest I had in these stocks, and he wrote out a list of oil stocks and was informed that the stock was worthless, and someone came to me and offered me good money for worthless stock, and I made the exchange. No one, to my knowledge, had any interest in my individual rights as a locator in these lands.

Q. Did you have any agreement in writing by which, in the event of your death, or in the event of your insolvency, or bankruptcy, or incompetency, to the effect that whatever interest you had in any of those locations, was to go and become the property, either in whole or in part, of L. B. McMurtry, or anybody else? Did you get the question? A. I get the question, but I don't see its reference to your preceding question. Q. It has no reference to my preceding question. A. Has it any reference to the endorsement on the back of that check? Q.

(Deposition of Julian P. W. Richmond.)

No, sir. My inquiry or question is as to the fact whether or not, either [261—154] before or after you became a locator of lands, you ever signed any documents to the effect that, in the event of your death, insanity, or incompetency, or any other contingency arising, that whatever rights you had as a locator should pass to Mr. McMurtry or anybody else, either in whole or in part? They charge you with being a "dummy" locator, and I want to find out whether you are or not.

A. I don't recollect making any such provision.

No, I had no intention, in the event that I should die or become incompetent, that my interest in lands located out there by reason of my power of attorney, should go to anybody other than as I should will it, or to my heirs at law, in the event of my death. The question never arose before me.

No, one, to my knowledge, had any interest in these stocks besides myself. I did not account to anyone else for the money which I received on account of those locations or the lands located thereunder or the power of attorney. I do not think anyone has asked me to account for anything received or made any claim that they had an interest in whatever I was entitled to [262—155] by virtue of any locations that were made in California. I do not think anyone asserted any claim to any of the stocks or money which I received by reason of this transaction.

Q. What do you mean by "I don't think so"; *to* you mean that you have no recollection of anybody's

(Deposition of Julian P. W. Richmond.)

so doing? A. I don't remember the idea coming to me at all. Don't remember that anybody ever made any demand or claim one way or the other. I don't remember that anybody did, and I don't remember that they did not. I now clearly remember that Thorn came to see me twice in regard to my stock in the Pacific Oil Lands Company. He came once without money and the second time he came with money, which makes a great deal of difference. I believe he had three hundred dollars. Am not sure that it was not $500. Do not recall what he told me on either visit. Was very busy, as I was going to Europe on a business trip in about three days. The whole thing was wound up before I left.

Q. Can you recall now that anything was said at that interview to the effect that—counsel will notice that the paper directly in front of me now and the one to which he referred—that he said to you that time that this stock represented your interest in these locations; the Government was claiming the lands, and that he was authorized to offer you five hundred dollars for your interest, and that you could take it, if you wanted to, or speculate on the result—

Let me advise you that I am not reading from the paper. I am not intending to deceive you or anybody else in that way. A. In a general way, I recollect that Mr. Thorn said that the future of this company was very precarious; that I could cash either the whole of part of my holdings through him and that is about all I can recollect. Q. Well, do

(Deposition of Julian P. W. Richmond.)

you remember whether he [263—156] stated he was acting for anybody else in the matter or not; have you any recollection on that? A. I remember that Mr. Thorn at one time told me that he was acting for Mr. McMurtry, but I do not recall that it was this question. Q. It was long prior to that, if I understand you correctly, that you had had these stocks looked into by your uncle or relative, and he advised you that they were not of value? A. I am not answering as to the time. Q. Well, is it a fact that, at the time Mr. Thorn came to see you, you had given up all hope of realizing anything out of that stock? A. I am not the kind to give up all hope, at any time, Mr. Ach. I am very optimistic. I had given up probably as much hope as I had given thought to the matter. I was never very deeply interested in these things, this particular deal.

Don't remember what I told Mr. Favorite. Don't remember what I told Mr. Favorite. If I discussed it with him, it would have been in an unofficial way, for I knew who he was. No, I had no intention of defrauding the Government of any rich mineral land or aiding or assisting anyone else in cheating or defrauding the Government. In authorizing McMurtry to locate the land in my name I had no idea or intention of assisting McMurtry or anybody else in obtaining a greater acreage or quantity of mineral lands than he was by law entitled to. Nothing that I should characterize as shady in this transaction was ever suggested to me.

(Deposition of Julian P. W. Richmond.)

No such thought ever was presented to me. There was no hidden understanding between McMurtry or Thorn and myself. Don't remember what sum I received when I sold my stocks. Don't remember the details of that transaction.

Q. Now, when you received this report, entitled, "Pacific Oil Lands Company, First Report to Stockholders," you stated to Mr. Hall that you had read it? A. I believe I have read it [264—157] before coming here. Q. By this report you were advised that a contract had been made with the Associated Oil Company of and concerning 1440 acres of these lands? A. Yes, sir. It made no impression on me at the time.

(The substance of this report being called to the attention of the witness.)

I believe I understood it at the time.

Q. Well, now, I have passed that, and I want to know whether it is not true that you knew when Mr. Thorn came to you and wanted to buy your stock that at that time he told you personally that the Government, acting in the matter in some way or other thought this was questionable and doubtful, that is, whether the Government would take these lands away, or something of that character, and that he told you this in order to give you some reason why you should sell the stock? Now, I want you to give me some good, common-sense reason for your selling the stock after receiving information that there was $1,375,000 the Associated Oil Company was to pay? A. The $1,375,000 is very small

(Deposition of Julian P. W. Richmond.)

to divide into a million parts. Q. And even so— A. Of which I had a few. Q. Even so— A. And the proviso there is that, if the Government refused to grant a patent to the land, that seemed very plausible to me; and those things combined were sufficient then and would be still sufficient for me to part with my stock for cash. Q. I know from hearing you testify that you read every document that you received. This particular piece of stock or certificate representing the stock, shows that the par value of the stock was $1.00 per share, and there were a million shares of stock. Now, this communication which you received and read showed that the Associated Oil Company had agreed to pay for these 1,440 acres of land in which you were interested— [265—158] A. I did not know beyond the particular land I was *interest.*

I had two motives in disposing of whatever stock I did, or for whatever sum I received, and one was that I needed some money at that time, and the other one was the fear of litigation. Did not give up this stock because I believed it belonged to somebody else or that any part of it, in equity or fairness, or by reason of any agreement, express or implied, belonged to Mr. McMurtry or Mr. Thorn or anybody else. In my mind I grouped together the thousand shares of the Pacific Oil Lands Company and the 750 shares of the Columbus Midway Company.

Not to my best recollection did I receive a report from McMurtry, Thorn or anybody to the effect

(Deposition of Julian P. W. Richmond.)

that they had located on any particular quarter section or twenty acres. Don't remember receiving any letter from McMurtry concerning these locations. Don't remember any statement to me by Thorn, Searls, McMurtry or anybody as to any interests of mine in this specific mining claim or that specific mining claim in California or elsewhere.

Q. Was there any suggestion made S. H. Freeman or Harry B. Thorn, to you, or by you to either one of those men, that your locations or the locations which would be made by Mr. McMurtry under this power of attorney, were intended to be locations for Mr. McMurtry or for any other person than yourself, either one of them? A. My impression then was that it was a co-operative scheme. Q. Among whom, the locators? A. As provided by law. Q. Relative to the assessment work that the law requires upon locations, and relative to the development work, is it a fact that Mr. Thorn told you that if Mr. McMurtry located any lands in the names of these locators, that the lands would be of such character that he could borrow enough money on the lands to do the assessment work, and the development work? A. I took that [266—159] for granted, probably. Q. Well, I want to know whether it is not a fact that Mr. Thorn made a statement of that character to you at the time you signed the power of attorney, or before? A. The thing seems so plausible, that I do not recall anyone suggesting it to me; it would occur to me naturally,

(Deposition of Julian P. W. Richmond.)

I think. Here is a— Q. Is it not also a fact that Mr. Thorn told you, either before or at the time of your giving the power of attorney, that there would be no charge for Mr. McMurtry's services, unless he located lands out of which avails would come over and above the expense, and that then his compensation was to be fixed when the result was attained? A. I don't remember; the question is difficult. Q. You are aware that Mr. McMurtry was not a locator upon any of these lands where your name was used, are you? A. I was not positively aware at that time; my impression was otherwise. Q. Was there anything said to you that you can remember as to whether Mr. McMurtry was to be paid any money out of the avails of these lands in the event that he should locate lands and they should turn out to be oil lands? A. I remember very little about Mr. McMurtry's connections with these locations.

Believe it is a fact that I did not put up any money for location expenses or assessment expense, nor do I remember any call being made upon me by McMurtry or anybody else for such purposes or my refusal to do so. Don't remember my impressions as to the details of the financing of the development. My impression was that the development was probably upon a share and share basis, something like farmer and tenant, owner and farm tenant.

Redirect Examination.

No, there was nothing unpleasant in the interview with Mr. Favorite at my home on August 25, 1916.

(Deposition of Julian P. W. Richmond.)

He showed me certain [267—160] credentials, asked me certain straightforward quesions, which I felt morally obliged to answer and I did.

(Said affidavit offered and read in evidence, as follows:)

"Julian P. W. Richmond of Yonkers, New York, being sworn, states:

"I am acquainted with C. W. Thorn and have known him for many years. In 1907 and 1908 Thorn had an office in the same building with me in New York.

"At this time I cannot recall the circumstances under which in December, 1907, I agreed to execute the power of attorney to L. B. McMurtry to make mining locations for me, nor can I recall what representations or promises were made to me at the time this power of attorney was signed.

"In the spring of 1908 I loaned C. W. Thorn $300 and he gave me as collateral or security some shares of stock in the Empire Oil and Development Company. Some time later Thorn not having repaid the money came to me and suggested that I become one of the eight locators of new and promising mining claims through which, without expense on my part, I would have the chance of reaping a reward which would offset the unpaid loan. He did not tell me that I would have a one-eighth interest in the lands to be located. It was my idea of the matter that Thorn told me of this proposition as a favor to me on account of the money which I had loaned him. It was my under-

standing that Mr. McMurtry [268—161] was in a sense my resident agent, squatting on the land and looking after the interests of myself and the other parties.

"This talk with Thorn took place at or about the time I signed a paper dated Aug. 16, 1910, in which I ratified the previous power of attorney I had signed.

"Sometime after this paper above mentioned was signed C. W. Thorn came to me and gave me some stock in the Pacific Oil Lands Co. I don't remember what he told me at the time he gave me the stock, nor do I remember how many shares of stock I received in said company.

"Several years after I received this stock, and to the best of my recollection sometime in the spring of 1914, C. W. Thorn came to see me and asked me if I wanted to sell the stock in the Pacific Oil Lands Co. At that time I had some difficulty finding the stock certificates, having given up hope of realizing anything out of the stock. Thorn came back a second time and I turned over the stock certificates to him and he paid me something like $300.

"I have an indistinct recollection of having made a money loan to Thorn previous to December 21, 1907; in fact I still have in my possession an unpaid note from Thorn for $100 dated January 29, 1908. It is possible this note covers an earlier loan.

"JULIAN P. W. RICHMOND,

"21 August, 1916."

(Deposition of Julian P. W. Richmond.)

Subscribed and sworn to before me this 21st day of August, 1916.

J. H. FAVORITE,
Special Agent, G. L. O. [269—162]

Mr. Helm came to see me between the time I was served with the subpoena and the date of my required appearance. (Mr. Helm identified in courtroom.) He gave me his card. He told me in a general way that he was associated with the interests counter to the Government, that Mr. Ach, the chief counsel for the defense, had met other locators besides myself. The conversation was probably lenghtier than that, but that was the gist of the conversation.

Q. When you disposed of your stock in the Pacific Oil Lands Company, did you know how many shares of stock in that company Mr. L. B. McMurtry owned? A. I probably took no interest in the matter. Q. Well, did you know how many shares of stock Mr. McMurtry then owned in the corporation? A. I don't remember, no. Q. Did you know how many shares of stock any other person other than yourself owned—the corporation? A. I don't believe I did. Q. Did you know what were the resources of the corporation? A. At what time, Mr. Hall? Q. At the time you parted with your certificate of stock in the Pacific Oil Lands Company. A. I believe I had certain information at hand, such as the Pacific Oil Lands Company's first report to stockholders. Q. Did that report guide you in the value which you placed upon your shares of stock

(Deposition of Julian P. W. Richmond.)

in the corporation. A. I don't think so. Q. On your cross-examination you told Mr. Ach that Mr. Thorn offered you an opportunity to invest in this matter. What did you invest in the matter? A. Is that my very first transaction? Q. I mean at any time in this transaction. A. I understood at the time—I believe at the time that I had the right to make such locations— Q. I did not ask you that, Mr. Richmond. A. And having once made certain locations, I would be estopped from making other locations, and my investment was my original power of attorney [270—163] Q. Did you invest any money in this transaction? A. The answer is, not directly. Q. Did you indirectly? A. I had a mental reservation— Q. I asked you not about mental reservation, but what you did. A. I think I have answered. Q. I ask you to answer it again. Q. What money you invested in this investment? A. I did not invest money in the sense that money is usually invested. Q. Well, in what sense then did you invest money? A. I thought at that time that my opportunities for locating claims were limited and that by once having located a claim I could then in future never locate any more. In other words, I gave up something which was irrevocable. Q. I am asking you about what money you invested. A. I invested no sum of money outside of possible incidental expenses. Q. What were your incidental expenses? A. Carfares and postage.

At the time I transferred my stock in the Pacific Oil Lands Company, I believe I parted with the

(Deposition of Julian P. W. Richmond.)

whole of my holdings. When I said on cross-examination that at the time of signing the power of attorney my impression was that it was a co-operative scheme my understanding was that those acting with me were, the number of persons whom the laws empowers to so act. I don't remember all of the persons that I understood were so acting. I can only distinctly recall Mr. Thorn's son, Harry Thorn, and his son-in-law, whom I do not recollect by name; Mr. Thorn was present and may or may not have been a locator.

Q. What was said by anyone at or prior to the time you executed the power of attorney as to Mr. McMurtry's compensation in these transactions? A. I don't remember it being mentioned. Q. Did you have the impression at that time that Mr. McMurtry was a locator, too? A. I don't remember that Mr. McMurtry was in my thoughts at all at the time. [271—164] Q. And did you know to whom you were giving your power of attorney? A. I must have known at the time. Q. Then who was it? A. I now believe it was Mr. McMurtry. [272—165]

**Deposition of Edwin L. Powell, for Plaintiff.**

EDWIN L. POWELL, a witness called April 17, 1917, on behalf of the plaintiff, testified by deposition as follows:

Reside at Somerville, Massachusetts. Am vice-president of the H. E. Holbrook Company, manufacturers' agents of window screens, etc., and also manufacturers of certain hardware specialties.

(Deposition of Edwin L. Powell.)

Was a partner in the company from 1898 to about 1911, when the partnership was turned into a corporation, since which time I have been vice-president. Was born in Indianapolis, Indiana, and was educated in the public schools of Indianapolis, Brooklyn, New York, and Stanford University, at which latter institution I was two years, not completing the course on account of illness. Lived in California about three years, during 1894–1897. Was not engaged in any business there and learned nothing of the oil fields while there. Was in San Francisco from November 12 to December 10, 1916, in connection with Government suits against certain oil companies. Don't know their official titles. Yes, believe it was United States against the 32 Oil Company and others, No. A–38, and United States versus Record Oil Company, A–41. Was requested to go by telegram from Mr. Helm, now present in the courtroom. I testified on the side of the defendants. Mr. Helm had previously interviewed me and given a brief outline of this matter, and said that there was a possibility that my presence would be desired in California in connection with it. I knew in a general way he represented the Oil Companies who were defendants, but did not know who they were. After I was in California I commenced suit against several different persons, Mr. McMurtry, E. A. Hoeppner, Mr. Searls, and Mr. Harrison I believe was mentioned also. Believe that suit is pending. Suppose [273—166] it is pending in California. A. I. McCormick is my attorney and

(Deposition of Edwin L. Powell.)

was suggested to me by Mr. Helm. The suit was to obtain an accounting in certain transactions in which Mr. McMurtry was my agent, in the location of oil lands under power of attorney, which I gave him. Was in New York in May, 1907. First became acquainted with L. B. McMurtry during the year 1906. Was then a salesman for the Underwood Typewriter Company, and met McMurtry at No. 299 Broadway. I introduced myself to him. He was then in the oil business. Don't remember exactly the title of the company. Believe it was called "Great California Consolidated Oil Company." Sold him some typewriting machines. Received stock in the Empire Oil & Development Company in payment. Called there quite frequently and Mr. McMurtry talked oil to me a great deal, and I was quite interested in his proposition and sort of gradually got into it myself. Finally, on June 3, 1907, gave up my position with the Typewriter Company to go with McMurtry. Went with him to attempt to help finance the company, to sell stock in the Empire Oil & Development Company. Sold stock locally, then went out of town and went to Canada. Had a few hundred shares of Empire Oil & Development Company stock at the time I went with McMurtry; shares that I had received in payment for typewriters and from time to time Mr. McMurtry gave me stock in the company as part payment for my services. Received a commission for selling this stock, either twenty or twenty-five per cent—don't recall exactly. C. W. Thorn was employed in McMurtry's office then, F.

(Deposition of Edwin L. Powell.)

H. Searls was also sometimes. Don't recall what Thorn did, but he was running errands, I believe, and did whatever office boy work that was required. Believe Searls was treasurer of the company. I was then engaged until December, 1907.

Q. I exhibit to you a certified copy of the power of attorney [274—167] given by yourself and others to Mr. L. B. McMurtry on December 18, 1907 (Plaintiff's Exhibit 7). Did you sign such an instrument? A. Yes, sir.

Signed it in the office of the Empire Oil & Development Company, 299 Broadway. McMurtry asked me to sign a few days before. The matter had been discussed a number of times and he mentioned the possibility of locating public oil lands in California, explaining quite fully the procedure, and suggested that he obtain a power of attorney from a number of interested parties and asked me to secure some, so that if, when he returned to California, there were public oil lands, which might be available as oil lands, he would be in a position to locate them. By interested parties he meant those interested with us in the Empire Oil & Development Company. This company was in bad condition at that time, the attempt to finance it having proven a failure on account of the panic of November, 1907, and they had reached the end of their rope. I do not recall what their entire objects were. They were to obtain and develop oil lands in California, but just the scope of it, I do not recall at this date. Believe they claimed to have options on same properties and leases on others—

(Deposition of Edwin L. Powell.)

oil lands in California. No development was being carried on then to my knowledge. Interested in this company were Mr. Thorn, Mr. Freeman, Mr Searls, Mr. Harder and myself. Those were the ones immediately interested. McMurtry left New York a few days after the signing of this power of attorney, about December 20.

Q. Then you think the matter of the execution of the power of attorney was talked of just a few days before it was executed, finally executed? A. The definite talk on it, yes; it had been discussed probably for a good many weeks before then.

I asked Taylor and Meinecke to sign this power within a [275—168] short time, within a few days before signing. Cannot fix the time. It was possibly a week before, but do not think it was as much as two weeks. Had known Meinecke eight years. He was employed by the Underwood Typewriter Company. Talked more or less about the general oil matters with Mr. Meinecke, as I had with others in the Underwood Typewriter Company, and I explained the situation to him to considerable length as to the possibility of there being oil lands in California, which could be located, and I represented to him that if he signed the power of attorney and gave Mr. McMurtry authorization to locate the lands in his name, that it might be to his financial advantage. Don't remember whether I was present when he signed I probably did ask him to go up to the office of the company and I possibly might have gone up with him, but I don't recall that definitely. Taylor was an

(Deposition of Edwin L. Powell.)

intimate friend of mine. He had lived with me for a number of years in my home and he was from California. When he first came to New York, he worked with the Underwood. Told him substantially the same thing that I did Meinecke. McMurtry had explained the placer mining laws to me. I understood that one man could locate twenty acres in one parcel; I understood in order to locate a large area it was necessary to associate persons under groups of eight. Don't recall being present when any of the others signed. After signing this power, up to March, 1908, and when I left New York, I was frequently in the office of the Empire Oil & Development Company. Received a few letters during that time, probably half a dozen in all. Had no definite news from Mr. McMurtry during that period. Simply knew that he was busy trying to locate lands. Inquired of Searls about this matter by correspondence and wrote direct to McMurtry a number of times. Had no definite information at all, simply that progress was being made. Believe the report was that Mr. McMurtry had [276—169] located lands under our power of attorney for us. Q. Did he tell you where they had been located? A. In San Benito. Q. What locations did Mr. McMurtry advise you had been made in your name? A. He did not advise me definitely as to just what locations were made, either the number of them or just where they were located, but simply the lands that he located were in the Midway field, and also in San Benito County, San Benito field. Q. Did he advise you that

(Deposition of Edwin L. Powell.)

he had located lands, both in San Benito field and in the Midway field in 1908? A. I don't remember. I would not swear definitely that he did at that time.

Would not be able to fix the date even approximately as to when I first learned that McMurtry had used my power of attorney in making any definite locations. I was told by Searls and McMurtry that lands had been located under my power of attorney. Cannot say just when. The first paper I signed after signing the power of attorney was the ratification of that power of attorney.

(This ratification read in evidence as Plaintiff's Exhibit 12. It is similar in form to Plaintiff's Exhibit 1 with the deposition of Frank B. Chapman, and purports to have been executed by Edwin L. Powell August 22, 1910.)

I recognize my signature on this photographic copy. McMurtry presented this to me personally in Boston for execution. He said that a ratification of the power of attorney which I had given him was necessary in order to enable him to consumnate certain deals that he had in prospect. That the lawyers for the people to whom he was trying to dispose of those lands required a ratification of this power of attorney to show that we were real people and that we were alive, and that we were in touch with the matter and approved of Mr. McMurtry's action. Did not know at that time [277—170] how many locations had been made in my name?

Q. Did you make inquiry of Mr. McMurtry at that time in regard to this contract of August 4, 1910?

(Deposition of Edwin L. Powell.)

A. I asked what the purport of the document was and Mr. McMurtry explained that there had been no contract actually entered into, this was simply a prospective contract, a preliminary step to a contract which he hoped to close. He did not tell me anything of the substance or effect of this contemplated contract with Herrin and others, except that if the matter went through, that it would involve a very large amount of money, and that I would have a liberal amount coming to me. Between that and the next step in the proceeding, I might have seen Searls. I talked with Searls a number of times and wrote him a number of times in respect to these oil land transactions. He just reported progress and never gave me any definite information as to how matters were progressing. Said that McMurtry was still attempting to put through various deals and that he had not been successful. I wrote McMurtry a number of times and got very few letters in reply. They are in my attorney's possession.

Q. I invite your attention to a check numbered 114, which is dated New York, September 23, 1910, drawn on the Second National Bank of the City of New York, by F. H. Searls, made payable to the order of William Mahr, do you remember of having received a check similar to that one which was made payable to your order and possibly bearing another date and another number? [278—171] A. Yes, sir. Q. From whom did you receive your check similar in character to this one made to Mr. Mann, or Mr. Mahr? A. I did not exactly receive a check; it was

(Deposition of Edwin L. Powell.)

exhibited in my presence by M. Searls. Q. When was it that Mr. Searls exhibited this check in your presence? A. It was not, I should say, until a month or six weeks after I signed the ratification of the power of attorney. Q. Do you remember the amount of that check? A. Yes, sir. Q. How much was it? A. $250.00. Q. Did you add your name to that check at any place? A. I did, I endorsed it on the back. Q. Look at the check of Mr. Mahr; I find upon the back of it in typewriting, the following language:

> "Received from L. B. McMurtry, $250.00 in full payment for all my right, title and interest in and to all lands located by said L. B. McMurtry, on my behalf, in Kern County, California, pursuant to a power of attorney made by myself and others to said L. B. McMurtry, bearing date the 19th day of December, 1907."

Was there a similar receipt or conveyance or similar language upon the back of the check? A. I believe so. Q. Which you signed? A. I believe so. Q. Did you sign your name immediately under it? A. I believe I did.

Received $250.00 in cash at the time I signed that check.

Q. Did Mr. Searls tell you why he was giving you this check for $250.00? A. He explained to me that that was part of the proceeds of some minor deal which Mr. McMurtry had out through in California and that a like amount was being distributed to each of the other locators.

I read the typewriting on the back of the check

(Deposition of Edwin L. Powell.)

before signing. Did not know how many claims McMurtry had located under this power of attorney at that time. No definite report was made to me at that time as to the condition of affairs with respect to those oil lands everything was always very vague, no detailed [279—172] report at any time was made to me, by Searls or anyone else. Was in New York frequently after signing the check and would telephone or drop in to see Searls and inquire concerning these oil lands. He was always optimistic and hopeful but gave no definite information.

Q. Have you any information with respect to the stage of the negotiations contemplated by the contract of August 4, 1910, between Mr. McMurtry and Herrin and others? A. No, sir. Q. Did you know or were you advised as to whether or not that contract had been finally executed? A. I was advised that it had not been. Q. Who advised you that it had not been? A. Mr, Searls. Q. Had you heard of any other contracts that were contemplated or had been executed with respect to these lands at the time you signed the check for $250? A. No definite contract, except that I was told that Mr. McMurtry had made one small deal which had netted a small amount, enough to make this division possible. Q. Did you know what deal that was, or the lands it affected? A. No, sir, and never had any definite information in regard to any of the transactions.

In the fall of 1911, I received in New York from McMurtry a certificate for 1000 shares of Pacific Oil Lands Company stock. Met McMurtry personally

(Deposition of Edwin L. Powell.)

at that time at the Knickerbocker Hotel. He then said that he had organized the Pacific Oil Lands Company and had turned all these lands, had transferred all these lands to the Pacific Oil Lands Company, to facilitate the handling of them, to facilitate deals, which he might, which might be made concerning them. I did not know at that time whether or not the contract of August 4, 1910, with Herrin and others, had been consummated. Do not recall that I ever heard of any contracts between McMurtry and Mrs. J. M. McLeod with respect to those lands. [280—173] except what I remember hearing in court in California, during the progress of the trial in which I testified in November, 1916. I met McLeod at that time. I might have heard his name mentioned by either Mr. McMurtry or Mr. Searls, but it made no impression on me than the hearing of any other name.

Q. At the time you received the certificate of stock of the Pacific Oil Lands Company, which is certificate No. 19, and I now present it to you as it is attached in the original stock book of the Pacific Oil Lands Company, did you know of the execution of any contracts between Mr. McMurtry and Herrin and others, or between Mr. McMurtry and Mrs. J. M. McLeod and others? A. No, sir. This certificate No. 19 is the certificate I received from McMurtry in the fall of 1911, at the Knickerbocker Hotel in New York. The receipt which is pasted upon the stub of certificate No. 19, which reads as follows: "Received certificate No. 19, for 1000 shares of Pacific Oil Lands Company, dated Sep-

(Deposition of Edwin L. Powell.)

tember 12, 1911," bears my signature. I was asked to sign this receipt by McMurtry. He did not explain why he wanted me to sign it.

Q. I invite your attention now to a receipt or rather the following language upon the back of certificate No. 19, to wit:

> "For value received, I hereby sell, assign and transfer *until* Walter S. Brann ——— shares of the capital stock represented by the within certificate, and I do hereby [281—174] irrevocably constitute and appoint Walter S. Brann to transfer the said stock on the books of the within named corporation, with full power of substitution in the premises. Dated March 14, 1914. Signed, Edwin L. Powell. In the presence of ——— this ——— day of ———."

Is that your signature to that (showing witness)? A. That is my signature, yes, sir. Q. When did you sign that, Mr. Powell? A. On the date indicated. Searls requested me to sign that in New York, I believe.

Q. What was the conversation that occurred between you and Mr. Searls at the time he requested you to sign that transfer? A. Mr. Searls told me that the affairs of the Pacific Oil Lands Company were not progressing satisfactorily; that the stock was practically valueless, but that Mr. McMurtry had authorized him to give me $250 for it. Q. What did you receive, if anything, of value, when you signed your name to this transfer, to

(Deposition of Edwin L. Powell.)

certificate No. 19? A. I received $250 in cash. Q. Since that date have you ever received anything of value on account of the fact that your name appears upon any oil land locations in the State of California? A. No, sir. Q. At the time you signed this transfer on the back of the certificate on March 14, 1914, what did you do with the certificate? A. I delivered it to Mr. Searls. Q. Since the time you delivered the certificate to Mr. Searls, have you received anything of value on account of your name appearing as a locator upon any oil lands in California? A. No, sir. Q. At the time you delivered certificate No. 19 to Mr. Searls, did you know who was in possession of any lands upon which you appeared as a locator in the State of California? A. No, sir. Q. Did you know at the time you surrendered that certificate, anything as to the condition of the lands upon which your name appeared as locator? A. No, sir. Q. Did you know the condition, [282—175] the financial condition, of the Pacific Oil Lands Company at that time? A. No, sir. Q. Did you know what the assets and resources of that company was or were at the time? When you delivered or surrendered certificate No. 19. A. No, sir. Q. Did you know how many locations of public oil lands had been made upon which your name appeared as a locator or colocator at the time you surrendered this certificate? A. No. Q. At the time you surrendered certificate No. 19, had you made inquiry, any inquiry as to the number of claims upon which your

(Deposition of Edwin L. Powell.)

name appeared as a locator? A. I do not—I never asked that specific question of anybody, no, sir. Q. Did you at the time you surrendered certificate No. 19, had you ever inquired of any person as to the condition or state of development of any of the lands upon which your name appeared as a locator? A. No. At the time you surrendered certificate No. 19, had you ever inquired of anybody who was in possession of the lands upon which your name appeared as a locator? A. No, sir. Q. At the time you surrendered certificate No. 19, had you inquired of any person as to the financial condition and resources of the Pacific Oil Lands Company? A. No, sir, except that I made general inquiry of Mr. McMurtry and Mr. Searls and Mr. Thorn on every possible occasion as to how matters were progressing in regard to these lands. Q. What would they tell you when you inquired? A. I never could get any definite information; sometimes the information that I got was optimistic, that there were great possibilities, and the next time it was very pessimistic, the bottom had dropped out of everything; I could never get any definite information from anybody. Q. At the time you received certificate No. 19, did you read it? A. Yes, sir. Q. Did you know at that time what the capital stock of the Pacific Oil Lands Company was? A. I probably did. Q. At the time you received [283—176] Certificate No. 19, did you know who were the stockholders in the Pacific Oil Lands Company? A. No, sir. Q. Did you know

(Deposition of Edwin L. Powell.)

how many shares Mr. L. B. McMurtry owned in the company at that time? A. No, sir. Q. Did you know how many shares of stock Mr. E. A. Hoeppner owned in the Pacific Oil Lands Company? A. No, sir. Q. Did you know how many shares of stock either one of those gentlemen owned at the date you surrendered certificate No. 19 to Mr. Searles? A. No, sir. Q. At the date you surrendered certificate No. 19, did you know what had become of the title and right to possession of the lands upon which you appeared as a locator in the State of California? A. No, sir. Q. Did you make any inquiry of anybody at the time of surrendering certificate No. 19, as to the title and right of possession of those lands? A. I don't know that I made any inquiry on just that way. I inquired of Mr. Searls as to general conditions, but not any specific inquiry of that sort.

(Proxy dated August 15, 1913, handed witness.)

That is my signature on that. Believe I received it by mail probably sent to me by Mr. Harrison, who was connected with the Pacific Oil Lands Company, I believe as secretary and treasurer. Don't remember whether a letter accompanied it or any advice that I received with respect to that paper, and my execution of it. Probably had some letter explaining the purport of it, but do not remember that I did.

(Plaintiff's Exhibit 13 read into deposition. It is a proxy similar in form to Plaintiff's Exhibit 5 with the deposition of Frank B. Chapman, and

(Deposition of Edwin L. Powell.)

purports to have been executed by Edwin L. Powell, August 15, 1913.) [284—177]

Probably returned that proxy to the person who sent it to me. Did not at that time have any definite information as to the number of claims on which I appeared as a locator in the State of California, or as to the condition or state of development of those claims.

Yes, that is my signature. (Plaintiff's Exhibit 14.) The paper first came into my possession probably approximately at the time it is dated, December 13, 1913; came by mail, I believe, from Mr. Harrison. I read it before executing it, and returned it to Mr. Harrison.

(Said exhibit offered and read in evidence as Government's Exhibit 14 with the deposition, *as* is as follows:)

(This exhibit is similar in form to Plaintiff's Exhibit 6 with its deposition of Frank B. Chapman, and purports to have been signed by Edwin L. Powell, December 13, 1913.) [285—178]

There was probably a letter with that paper. If there is any such letter, it is in the hands of Mr. McCormick. Do not recall that there was any other writing or typewriting accompanying the letter and paper. Probably a month later I received from the Pacific Oil Lands Company a check for $20.00.

Q. I invite your attention now to a check which is, in substance, as follows:

(Deposition of Edwin L. Powell.)

"San Francisco, 1/8/14. No. 1185.

THE BANK OF CALIFORNIA.

National Association, San Francisco.

Pay to the order of Edwin L. Powell, $20.00—Twenty dollars.

PACIFIC OIL LANDS CO.

F. E. HARRISON,

Secy. & Treas.

L. B. McMURTRY,

Vice-Pres."

Is that check the check you received (showing witness)? A. Yes, sir. Q. And that is your endorsement on the back of the check, is it not, Edwin L. Powell (showing witness)? A. Yes, sir. Q. What did you do with the check? A. I put it through my bank, as I remember it.

This check came by mail addressed in Mr. Harrison's handwriting. There probably was a letter with the check. It was probably a letter explaining what the check was, probably explaining that the check was a distribution as a result of my authorization, to my consent to the distribution. Don't know [286—179] where this letter is. May be in the hands of Mr. McCormick. I turned over to Mr. McCormick all the communications in regard to this matter that I had received. Do not recall that there was anything in this envelope besides the check and letter from Mr. Harrison, if there was such a letter.

Q. I invite your attention now to three typewritten sheets which bear the title, "Pacific Oil

(Deposition of Edwin L. Powell.)

Lands Company, First Report to Stockholders," and in pencil, in the upper right hand corner, appears, "Jan. 1914," and in the upper left hand corner, in pencil, the initials, "H. A.," and just below that the initials "F. H." Please examine those sheets of paper carefully, Mr. Powell (showing witness).

Q. At the time you received the last check for $20.00 to which we have referred, did you receive this report or a copy of it? A. I believe not.

I do not believe I ever received a copy of it. I believe the first time I ever saw it was in California last November. Received this check for $20.00 before I surrendered the certificate No. 19.

Q. I want to get as definite a statement as I can from you in regard to the receipt of this Pacific Oil Lands Company's report, and I may become somewhat leading in my questions, but the burden of that I will take myself. Do you now say that you positively did not receive this report? A. I say to the best of my recollection I did not receive it, [287—180] but I cannot say positively that I did not.

I may have, but I think it is very unlikely that I did, because I have absolutely no recollection of having received it. I am the person who appeared as a witness for defendants November 20, 1918, in case No. A–38, United States vs. Thirty-two Oil Company, pending in the Northern Division of the Southern District of California. Was then ex-

(Deposition of Edwin L. Powell.)

amined by Mr. Oscar Lawler, who appeared for defendants there.

Q. I invite your attention now to the following portion of your testimony which is found at pages 598 and 599, of the stenographer's transcript in that case, as follows:

"Q. Can you recall the substance of any of these conversations that took place—I presume they took place at the office of the company usually, didn't they? A. Yes, sir. Q. In the latter part of the year 1907 and prior to Mr. McMurtry's leaving for California? A. Mr. McMurtry had many times talked with me and others in my presence in regard to the probable value of oil lands in California, and he represented them, in his opinion, to be of very great value, and he stated that it was his opinion that there were in California valuable oil lands or oil land which would probably become valuable which would be subject to location—Government lands. Q. Do you recall the occasion of the execution of a power of attorney authorizing the location of oil lands? A. Yes, sir. Q. Will you state as nearly as you can recall them the circumstances under which that occurred and the conversation that took place at or about that time with reference thereto? A. Mr. McMurtry explained something of the laws under which oil lands might be located, and said that a certain number of persons would be necessary to associate themselves, in groups of eight, I believe, in order to locate these Government lands, [288—181]

(Deposition of Edwin L. Powell.)

after which location it was necessary to do certain work in order to retain them and get title to them, and we talked it over a good many times about the possibilities of locating such lands, and in that way making up for the hard times we had been through and recouping our losses in this other proposition. Q. That is, the losses sustained in the Empire Company? A. Yes, sir." Do you remember of having so testified before the Court in San Francisco on the date I have mentioned? A. Yes, sir. Q. Mr. Powell, do you know when your name was used [289—182] upon any location notice or first appeared upon any location notice of the northeast quarter of section 34, the northeast quarter of section 20, the northeast quarter of section 22, or the northeast quarter of section 26, in township 31, south, range 23, east, in Kern County, California? A. No, sir. Q. The records of Kern County, California, disclose that the lands I have just described were located on January 1, 1909, by Mr. McMurtry, using your name and the names of seven others. Prior to that time had you any communication or dealings whatever with F. H. Denison, R. E. Price, or Pierce, C. A. Converse, H. B. Rentschler, and Jesse Cunningham, with respect to any rights that they might have had in the lands I have specifically described, prior to December 31, 1908? A. I never heard of any of those persons; I never had any dealings of any sort with them, and did not know that they existed.

Had no knowledge prior to December 31, 1908,

(Deposition of Edwin L. Powell.)

as to the state of title or the right of possession with respect to these northeast quarters of sections 34, 20, 22 and 26, and was not advised that these persons whose names you have just called, F. H. Denison and others, had been located upon these lands by McMurtry under their power of attorney.

Cross-examination.

No, nothing was said in this conversation with McMurtry about locating oil lands in California, as to his wanting to use my name in order to locate the lands for his benefit, or that he might acquire an interest in them, nor did I make any such suggestion in soliciting Taylor and Meinecke to sign, or suggest that they should act as dummy locators for McMurtry or anybody. No suggestion or intimation was made to me by McMurtry that he [290—183] wanted to use the names of thirty-two people, or any people, so as to take up land in California for his own benefit. This subject was never broached at any time by McMurtry, Searls or any body on behalf of Searls or McMurtry. No, these locations were not to be made for the benefit of the Empire Company, but for the individuals. We had been in an unsuccessful venture together and we were naturally looking for means of making some money. And Mr. McMurtry suggested the location of oil lands in California as a means to that end. Yes, I remember during these conversations I was having with McMurtry in New York in 1911, which indicated that he was in possession of the lands and was doing his best to stay in possession of them, and something

(Deposition of Edwin L. Powell.)

about having trouble in keeping off jumpers, but had no personal, actual knowledge, or no definite or specific information on those points. There were always stories told by McMurtry and Searls of difficulties and troubles and obstacles they met in the way of executing contract which they had tried to execute, and holding the lands the explanations were made in such a way that I understood that Mr. McMurtry was pretty well occupied, pretty busy, in looking after the properties. Yes, the low price of oil at various times was given as one of the difficulties they encountered in their operations out there in regard to these lands, and something about the land being withdrawn by the Government, which would probably lead to litigation. At the time McMurtry got me to sign this ratification (Exhibit 12) he told me it was a very delicate proposition and there was considerable question as to whether it would go through or not. Do not recall his calling my attention to the fact that the Government had attempted to withdraw these lands and that question might have to be met too. Cannot fix the time when I first knew of that. At the time I [291—184] signed this ratification I understood from McMurtry's explanation as to the matter that these contracts were all prospective profits and that there was simply a contract which would look to the development of the lands and profit would come, if the land proved to be valuable. There was no intention on my part at any time to permit my name to be used by McMurtry or anybody else in the matter of these

(Deposition of Edwin L. Powell.)

locations to cheat or defraud the Government in obtaining from the Government any greater acreage of land than I or any other person would be entitled to, and I know of no such intention on the part of any of the thirty-two locators. Was not advised at the time I signed these ratifications or at the time I received the check for $250.00 or at the time I signed the transfer of stock or any time prior thereto, that McMurtry had received moneys from the Associated Oil Company from any contracts.

When I saw Searls in Boston prior to going to California, either 1912 or 1913, he told me that he had been waiting until things progressed far enough so that his services would be needed out there, and he said that Mr. McMurtry had sent for him and had told him to come out to California, and that he had packed and shipped his household goods, and that he was then on his way to California, in a roundabout way, was going to stop off in Maine for a short visit before he went out; he said the situation looked promising out there, and looked like they would be able to do something substantial as property deals were pending.

At the time I turned over my stock Searls gave me to understand and he told me that there were no prospects of any further returns from the project; he told me that the stock was practically valueless. The withdrawal by the Government was one of the difficulties. Nothing was said about McMurtry having received any sum of money like $85,000, or $175,000, or any [292—185] substantial sum at all. He

(Deposition of Edwin L. Powell.)

said the lands were practically, the project was practically a failure, and he said the stock was not really worth anything, but, in order to facilitate Mr. McMurtry's handling of the affairs from that point on, to combat the troubles that were arising, that Mr. McMurtry wanted the stock in his own hands, all of it, and offered $250 for my 1000 shares. That if the Government should proceed and take the land away there would not be anything in this thing at all either under the contract that was contemplated or in any way. Yes, that was substantially what he said. Mr. Brann accompanied Mr. Searls on one of his trips to Boston, and we three had breakfast together at the Adama House in Boston. Cannot say whether that was before or after the stock transaction. Did not know that Mr. Brann had any interest whatever in the transaction. He was introduced as a friend of Searl's. Yes, on a number of occasions when I had conversations with McMurtry, he said, "Leave the matter with me," and when anything important had been achieved we would all have a full report of it. Yes, I understood that the matter would be handled by leasing or giving away part of the lands that McMurtry could have the entire lands in the areas in which he might locate for us developed, and give actual value to the parts that were retained. No, we were not absolved from the payment of assessment work or charges for development. Yes, I gave him full power to mortgage or sell or do with the lands whatever, in his judgment, was best to bring us financial returns. The subject of McMurtry's

(Deposition of Edwin L. Powell.)

compensation was never discussed. I understood that McMurtry was to be reimbursed for his work and services. He was a practical man and was acting as our agent and if any valuable properties were secured by his actions as our attorney, he was to be liberally compensated for his work and handling it for us. That matter [293—186] was never discussed by me with anybody else. It was wholly a matter for the future. That was simply my understanding. At the time I signed this check for $250.00 with the endorsement on the back, I left it with Searls and he gave me $250.00. He said that he would save me the trouble of putting it through my bank, and if I would endorse it he would cash it for me right there.

Q. And that you received this money on the check some time in 1910, which was a year or approximately a year before the organization of the Pacific Oil Lands Company? A. Yes, sir. Q. Can you explain to me, as you read this endorsement, how it came that you endorsed it, and how it was that, notwithstanding your endorsement in 1910, transferring all your interest in these lands, pursuant to this check to Mr. McMurtry, you afterwards in 1911 got 1,000 shares of stock and afterwards that was purchased from you? In other words, why did you do this at that time, and what was the occasion, and what he said to you? A. I will explain it as it was explained to me. Q. Yes. A. I signed that, and I told Mr. Searls I was apparently signing away my birthright, and he said that was simply a matter of

(Deposition of Edwin L. Powell.)

form; that that did not really change my status at all in the matter in these lands or locations, and that was simply a matter of form, and it was wanted to facilitate negotiations, and I received the stock in the oil lands company a year later. Q. I have either missed part of your answer or I did not quite understand it. Do you mean to say that at the time of this check being presented to you by Mr. Searls, you questioned with him the execution of the instrument on the back of the check? A. Yes, sir. Q. And that he told you this was simply a matter of form and that you still retained your interest in the locations? A. Yes, sir. Q. Did he give you a [294—187] more specific reason, and by that I mean, did he tell you why Mr. McMurtry, in giving you this $250 as a result of some returns from some of these located lands, and giving the same amount of money, as I understood you to say, to each and every other locator, was asking for that kind of document, did he say anything at all about its not meaning what it said, that it might be error? A. Yes, sir, that was the whole explanation; it was always given to him with the understanding that it would facilitate the negotiations that were pending, and he assured me the document did not mean what it said. Q. In other words, you had already given Mr. McMurtry your power of attorney to locate lands and sell them and do as he pleased with them? A. Yes, sir. Q. And you thought that you were executing a power of attorney in another sort of form by reason of what

(Deposition of Edwin L. Powell.)

Mr. Searls said? Q. Was that what Mr. Searls said to you, in substance and effect? A. Yes, sir. Q. But you cannot recall the language of what he said? A. No, sir. Q. After you got this check, which was in 1910, Mr. Searls was in and about New York, you in Massachusetts, until at least 1912, and 1913, when he went to California? A. Yes, sir. Q. Did your correspondence concerning this land with Mr. Searls occur after you had received this check and this money? A. Yes, sir. Q. Did he ever say to you, or did Mr. McMurtry ever say to you, afterwards, that you were simply being treated liberally and without any legal rights in the matter, when you asked him the question? A. No, sir.

Redirect Examination.

Q. When you had this understanding with Mr. Searls, about the signing of the check for $250, in 1910, is it not a fact that you understood that you were placing the title and right of [294½—188] possession to these lands in Mr. McMurtry's hands so that he could do with them and deal with them as he thought best? A. Not for his personal benefit, no, sir. Q. No, but I don't mean that; I mean so that he could transfer the lease or negotiate or have developed these lands, as he thought best? A. He always had that right from the very first, from the time we gave him the power of attorney and ratification of it. Q. And you understood that he could handle these lands in any way that he saw fit? A. Yes, sir, but I also understood that he was

(Deposition of Edwin L. Powell.)

to report to us— Q. Did you not understand that Mr. McMurtry had full right after you signed this check, to sell or convey or lease or develop these oil lands to third parties without further conveyance or consent from you and your colocators? A. Yes, sir, just the same rights as he had before I signed the check. Q. Mr. Ach asked you in regard to some testimony at page 637 of the record, and I read previous thereto as follows:

"Q. But your willingness to help out extended to Mr. J. B. Thickens? A. Yes, sir. Q. You wanted to see him reimbursed for the loss he had sustained in the Empire Oil & Development Company? A. Yes, sir, I was willing to. Q. And it was with that idea in mind that you executed this power of attorney to Mr. McMurtry? A. Yes, sir. Q. And it was your understanding at that time, was it not, that Mr. McMurtry was to have whatever benefit might be flowing to him out of the making of these locations? A. I didn't understand that the locations were to be made for Mr. McMurtry's benefit; no, sir. Q. Did you understand that Mr. McMurtry was to be benefited by reason of the making of the locations? A. In a general way. He was acting for us, and I expected and understood that he would be reimbursed for his services as our agent." [295—189] Did you so testify in the hearing of A–38? A. I so testified.

Never met Major E. A. Hoeppner and never consented that he should derive any benefit out of

(Deposition of Edwin L. Powell.)

the lands located by McMurtry under my power of attorney, nor was I asked to.

Q. In response to Mr. Ach's question, you said at the conference between yourself and Mr. McMurtry in Boston, when you executed the ratification, that Mr. McMurtry told you it was problematical as to whether or not certain contracts might be carried out. What contracts did you there refer to? A. The contracts referred to hinted at in the ratification that he asked me to sign.

Since delivering this certificate No. 19 to Searls, do not know whether I have any interest in the company or not, that is a question I have not been able to decide in my own mind. Have not participated as a stockholder in any corporate business of the company. This transfer on the back of certificate No. 19 was signed in blank. There was no transferee named.

Q. At the time you signed the name "Edwin L. Powell" to the transfer on the back of certificate No. 19, to whom did you intend to transfer your shares of stock in the Pacific Oil Lands Company? A. I did not know definitely who was to actually own the stock after I turned it over to Mr. Searls. Mr. Searls said that Mr. McMurtry had authorized him to give me $250 for the stock, but nothing was said as to who was to own the stock after I turned it over to him.

Did not ask Mr. Searls who was to own the stock. Have not received anything of value since I surrendered this certificate No. 19 to Searls. [296—190]

**Deposition of George W. Berry, for Plaintiff.**

GEORGE W. BERRY, called April 19, 1917, on behalf of the plaintiff, testified by deposition as follows:

Reside at 91 Ferguson Street, Corona, New York City. Estimator, in the printing business. Lived in Corona in December, 1907. Place of business was No. 9 Murray Street. Knew L. B. McMurtry a good while before that. Met him through Mr. F. H. Searls, whom I had known probably fifteen or twenty years. He was my employer at one time in the printing business. I owned some stock in the Empire Oil and Development Company. Cannot say how much. It was given me as a bonus on notes that I held of Mr. McMurtry's for money that I had loaned him. McMurtry owed me money in December, 1907.

Q. The records of Kern County, California, disclose that there is recorded therein a power of attorney (substance of Plaintiff's Exhibit 5 stated). Are you the George W. Berry who executed that instrument? A. I did.

Have forgotten any conversation in regard to the matter, but remember it was taken up with me and I think Mr. Searls first spoke of it.

Q. Why did you sign it? A. Because I expected to gain something from the powers that Mr. McMurtry had as a developer of the land.

Expected to gain something in a monetary way. From development of the property and afterwards sale, and whatever other method would bring out

(Deposition of George W. Berry.)

profit. Imagine Mr. Searls told me about this. He was my prompter in all these acts; I didn't know an awful lot about Mr. McMurtry, except I had met him [297—191] several times. Had no knowledge of mining laws; in fact, I have none yet. Depended upon Searls for advice and information on this power of attorney and the transactions growing out of it. Don't know when I next heard about it. I was occasionally writing to Mr. Searls and he usually said something about them. Remember signing several papers afterward, but cannot remember what they were.

Q. Mr. Berry, I invite your attention to check No. 121, dated New York, September 30, 1910, drawn on the Second National Bank of the City of New York, by F. H. Searls, payable to the order of George W. Berry, for the sum of $250. On the back of that check is the following in typewriting:

> "Received from L. B. McMurtry, $250.00 in full payment for all my right, title and interest in and to all lands located by said L. B. McMurtry, on my behalf in Kern County, California, pursuant to the power of attorney made by myself and others to L. B. McMurtry, bearing date the 21st day of December, 1907."

That is signed, "George W. Berry." Is that your signature to that check on the back thereof (showing witness)? A. Yes, sir, it is.

That check must have been given to me personally by Searls. Don't remember reading the typewriting on the back, but it must have been there.

(Deposition of George W. Berry.)

Don't remember whether I read it at the time. Did not pay the check through any bank. Think I simply endorsed it and handed it back to Searls and he gave me cash for it. Don't know why this was done. Suppose there was some conversation at the time, but these things are so vague in my mind that I don't remember what was said about it, or just exactly what it was for. Don't remember what the next paper was [298—192] that I signed.

(Government's Exhibit 14 shown witness.)

Q. Please examine it and tell me whether or not that is your signature on the paper. A. Yes, I signed that.

Don't remember who presented it to me. I think it was at the Waldorf, but am not certain. Am not certain if that was the time Mr. Thorn and Mr. McMurtry were present. Don't remember what was said to me only that I was to agree to it—to give Mr. McMurtry the right to do what he could with the land, that he was prospecting on. That is the only reason I knew. I was not well acquainted with those oil land methods. I knew that something had to be done to make it profitable and that was the only thing I knew about it. Most of the information I got was from Searls. When I was employed by him he was talking pretty much all the time about this business and occasionally I would meet him, if that was when he was in New York here, and I met him on a number of occasions. Don't know who advised me of the necessity for

(Deposition of George W. Berry.)

signing Exhibit 14. I must have read it; I don't usually sign things without reading them.

Q. You will notice that there is in this paper the following:

> "And I do hereby ratify, approve and confirm those certain contracts of sale made for me and in my name by L. B. McMurtry as my said attorney in fact with W. F. Herrin, et al., of date the 4th day of August, 1910."

Was there anything said to you about this contract of August 4, 1910? A. Not that I remember. Q. Did you know at the time you signed the ratification— A. You call this the ratification? Q. That is the ratification, Exhibit 14—about the contents or the purport of this contract of August 4, 1910? A. Why, I [299—193] know there was some conversation, probably a half or three-quarter of an hour's conversation before I signed this, and I don't remember what it was all about just now. These things slip your memory, you know. Whatever it was, it must have been something I agreed to, or I would not have signed it.

Remember receiving a letter from Searls at one time in which he made statements about different localities that McMurtry was locating. Don't think he said the number of them, only that there was something said about several, or more than one anyway. Don't know whether this letter was received before or after this ratification. Have a faint recollection of seeing a map or sketch or drawing of some kind in which there were some

(Deposition of George W. Berry.)

peculiarly shaped tracts that were laid out, and I think that must have been in the hands of Mr. Searls, and whether there was one or a dozen on that, I don't know, but I remember there was at least one. I have in mind the figure of 1400 acres. I may be wrong on that, but that seems to be the figure that I have in mind. I know there was a small quantity of something like forty acres, and I think that was the one I was interested in, some similar amount. This thing is very vague to me and after a lapse of a good many years, you lose practically all of that in fact, after you have thrown the thing aside as being something of the past, you forget these things.

There was so much told me by Mr. Searls about different tracts it is all a muddle to me. I remember that one piece of property was located a far distance from another, from the way he spoke.

(Plaintiff's Exhibit 14 offered in evidence in connection with the deposition, and is as follows:) [300—194]

(This is a ratification similar in form to Plaintiff's Exhibit 1 with the deposition of Frank B. Chapman and purports to have been executed by George W. Berry, August 15, 1910.) [301—195]

Cannot say whether check 121 was received before or after signing Exhibit 14. Certificate No. 32 of the Pacific Oil Lands Company, for 1,000 shares stock, was received by me and the receipt attached thereto, dated September 18, 1911, bears my signature. This certificate was received from Searls

(Deposition of George W. Berry.)

personally, I think at No. 9 Murray Street. I don't remember what conversation took place.

Q. Do you know why Searls gave you this certificate of stock in the Pacific Oil Lands Company? A. Yes. beause there was considerable interest due me on my note, and, as I understood it, Mr. McMurtry owned property on which he had a right to hand me that as part payment of some of the interest he owed me on my note, which I never received fully. Q. You say Mr. McMurtry owned the property? A. Pacific Oil Lands Company, that is, Mr. Searls used to speak of them as "Mack's property." What that meant, I don't know. I suppose, though, because he was interested in it more than some other lands; I don't know. Q. Did you give Mr. Searls anything of value for this certificate No. 32? A. No except the owing of interest on my notes. Q. Notes from whom? A. From Mr. McMurtry; and when this Empire Company went to pieces, why, I was handed some of that stock, and I think that was the stock. Q. I invite your attention now to the back of this certificate and the reading thereon, or rather the writing thereon is as follows:

> "For value received, I hereby sell, assign and transfer unto Walter S. Brann ——— shares of the capital stock represented by the within certificate, and do hereby irrevocably constitute and appoint Walter S. Brann to transfer the said stock on the books of the within named corporation, with full power of substitution in [302—196] the premises.

(Deposition of George W. Berry.)

Dated ———, 19—.

In the presence of

———————.

(Signed) GEORGE W. BERRY."

Is that your signature to that (showing witness)? A. Yes, sir, it is. Q. Do you remember when you put that on there? A. Oh, when Mr. Searls—really, when he came to me about it and asked me to bring the stock over one day I remember be brought—or rather then I signed that. I think that was the time. Q. What did you do with the certificate at the time you signed it? A. Gave it to him, but I have no recollection of those names at all; I don't know this man. Q. You don't know Walter S. Brann? A. No. My dealings in that were with Mr. Searls.

Don't know how long I kept that certificate. Received $250 in cash when I surrendered it to Searls. (Witness identifies signature on Plaintiff's Exhibit 15.) Don't remember who presented that to me, nor do I remember executing it.

Q. Will you read the paper and see if that refreshes your memory any, Mr. Berry? A. I don't remember that. I may be muddled up on some of these papers. If I knew just where that was, when I signed that, it might recall to my mind. I think I have got several of these papers rather muddled up in my mind as to where it was they were signed. Q. I see the notary adds to his certificate in rubber stamp, "Notary Public, Westchester County, Certificate filed in New York County." Does that recall

(Deposition of George W. Berry.)

anything to your mind? A. Why, let me think now. No, it does not. I was trying to think of another document I signed, but had no connection with this at all, which was in Westchester County, but it was in relation to a deed. I cannot place that. It is my signature. I must have signed it, but I cannot recall where it was signed. If I could, I might recall the incident. Q. Can you tell me now why you signed this instrument marked Government's [303—197] Exhibit 15? A. Why, I must have been willing to give him these powers.

(Plaintiff's Exhibit 15 read into the deposition. It is a proxy similar in form to Plaintiff's Exhibit 5 with the deposition of Frank B. Chayman and purports to have been executed by George W. Berry, August 12th, 1913.) [304—198]

I remember this. (Plaintiff's Exhibit 16.) Think it came to me through the mails with a letter signed Harrison. Must have returned it to Harrison. I still have the letter which accompanied it.

(Plaintiff's Exhibit 16 read into the deposition. This is a consent to dividend similar in form to Plaintiff's Exhibt 6 with the deposition of Frank B. Chapman and purports to have been signed by Geo. W. Berry, December 10, 1913.) [305—199]

After signing Exhibit 16, received a check for $20.00.

Q. I now invite your attention to a check, to this check, which purports to be dated San Francisco, 1/8/14, No. 1195, drawn on the Bank of California, San Francisco, and made payable to the order of

(Deposition of George W. Berry.)

George W. Berry, for $20.00. That is signed, "Pacific Oil Lands Company, by F. E. Harrison, Secretary and Treasurer; L. B. McMurtry, Vice President"; and on the back is endorsed, among other endorsements, "Geo. W. Berry." Is that the check, or does that represent the money you got (showing witness)? A. That represents the money with my name on it, and it must be the check.

Think I received it with a letter. Think the letter says why it was sent to me. I have forgotten what it was now. At the time I surrendered this Certificate No. 32 for stock in the Pacific Oil Lands Company to Searls, did not know how many claims had been located by McMurtry under the power of attorney of December, 1907, on which my name appeared. Did not know there was more than one. Thought I only had one, the right to one claim; I didn't know there was anything else. At the time I surrendered the certificate 32 to Searls, did not know what rights I had in any land that had been located under the power of attorney in my name. I cannot see how I would know. Did not know how many locations had been made in my name or how many acres of the public domain were embraced in the locations. Made no inquiries as to the number of claims or acres filed on [306—200] in my name. Did not know who the stockholders in the Pacific Oil Lands Company were, or the extent to which McMurtry was a stockholder at the time I surrendered certificate 32 to Searls. Did not know to what extent Major E. A. Hoeppner was a stockholder or what

(Deposition of George W. Berry.)

the assets and resources of the company were nor had I heard anything about the contract of August 4, 1910, between McMurtry, Herrin and others. Cannot fix the dates at all, but between the times of the signing of the power of attorney in December, 1907, and to-day, I have heard on several occasions that they were drilling wells and expected oil from them on lands located under the power. Got this information from Searls but cannot say when. It must have been before the surrender of certificate 32, to Searls.

Q. I now invite your attention to a paper, or three sheets of typewritten matter which is headed, "Pacific Oil Lands Company, First Report to Stockholders," and in pencil, in the upper right-hand corner, "Jan. 1914," and in the upper left-hand corner, the initials "H. A." and "F. H."; will you please examine that (showing witness)? A. I have seen a paper similar to that before. Q. Do you remember where you received it from, or when you saw it? A. Why, I know I received it at home. Now, just when that was— Q. Was it before or after you surrendered your certificate No. 32 in the Pacific Oil Lands Company? A. Why, I cannot say that of a surety, but I know I can place it within six years, and that is the nearest I can come to it. Q. With reference to the check for $20, dated January 8, 1914, can you fix any time when you received this report from the Pacific Oil Lands Company? A. As to whether it was before or after? Q. Yes. A. No, I cannot say whether it was before or after, but I imagine it was not very far distant from it. Q.

(Deposition of George W. Berry.)

When you signed the original power of [307—201] attorney in December, 1907, what was your understanding as to the liability, if any, you were incurring by signing that paper? A. How do you mean legal liability? Is that the intention? Q. I mean the liability that you might incur for the development of any oil lands? A. Well, I guess whatever liability would occur in any business proceedings. Q. Was there anything said to you about what your liabilities might be? A. No; but I think from my business experience a man is liable at any time for his acts along those lines in a business way. Q. What representations were made to you, if any, by anyone, as to what liability you might incur by signing that paper? A. I don't think there was any. Q. Was there any suggestion made to you by anyone as to what expenses you might be put to by reason of your signing this paper? A. No.

This question was not mentioned by Searls. McMurtry's liability to me at the time of the execution of this power of attorney in December, 1907, was somewhat around $1500 and $2000.

Q. Had McMurtry satisfied this obligation? A. Yes, sir.

Cross-examination.

In December, 1907, held McMurtry's note for somewhere around $1,500 and $2,000, including interest. Do not remember the date of the note. Had Empire Oil and Development Company stock as security. He paid me the principal and some interest, and the remainder in Columbus stock. The settlement on be-

(Deposition of George W. Berry.)

half of McMurtry was made by Searls in person. The indebtedness was an old one as evidenced by a note which had been renewed from time [308—202] to time prior to December, 1907. Don't think it was renewed after 1907. Had known McMurtry not less than five years when I signed this original power of attorney, and was well acquainted and friendly with Searls, as I am now. At the time of signing this power, believed in the integrity of Searls and had no reason to doubt his honesty and purpose. Searls and I had frequently spoken to McMurtry with regard to his business experience and mining experiences, and they told me that they thought McMurtry knew or could find some unoccupied Government land in California, which would be open to location and which might be valuable for oil, and that McMurtry was going to California to attempt to find such lands. Yes, at the time I expected this power of attorney in 1907, I realized that the Empire Oil and Development Company stock that I held was valueless.

Q. What is the fact as to whether Mr. Searls said to you that Mr. McMurtry was anxious to locate lands, oil lands, in California, for people to whom he was obligated, and for people who had lost money in the Empire Land Company, or the Oil and Land Company, in order that he might repay his obligation, and give them an opportunity to make money? A. What is that question again, please. Q. (Question read.) A. Yes, Mr. Searls made that statement. No, Mr. Searls never asked me to lend him money to assist him or McMurtry to perpetrate

(Deposition of George W. Berry.)

a fraud upon the Government, nor did McMurtry, Searls or any other person could get more mining land than entitled to. No, Mr. Searls did not ask me to give McMurtry this power of attorney nor to lend McMurtry my money so that he could locate land for himself. Yes, I gave that power of attorney to McMurtry in good faith. I remember going to the Waldorf Astoria Hotel in New York and signing that ratification. [309—203] Remember Thorn was there and someone else. Am not certain that it was McMurtry. Yes, knew at the time I signed this ratification that McMurtry had taken action under the power of attorney that I had given him and that he was representing that he had made contracts with Herrin and others of date August 4, 1910, which were contracts of sale concerning the lands located for me and other people. Nobody at that time said anything to me about my being only a nominal holder because the lands belonged to McMurtry or Searls, nor did I ever say any such thing to anybody.

Q. Now, as I have read this thing to you, and drawn the matter to your attention, you did know at least by August 15th that contracts had been made for you on your behalf by your attorney in fact that you were ratifying those contracts, didn't you? A. Yes, sir. Q. Now, does this refresh your memory, that Thorn, or McMurtry or anybody else was present, whoever it might have been, said to you that it was necessary to have these ratifications, because the Attorney of Mr. Herrin, who was acting for the Associated Oil Company, or Mr. Herrin and the

(Deposition of George W. Berry.)

other people, demanded proof that the principals were alive and Mr. McMurtry was authorized to go on and sell these lands, or their rights in these lands; do you remember that? A. Well, of course, there was a conversation at that time in regard to this matter in which I signed it agreeable with that conversation, and that the exact wording, or rather the inference, I don't remember now, but I know it agreed with that which I read over several times before I signed it.

Yes, I know that whatever was said I was told it was necessary that my signature should be attached to that document, and am satisfied that I knew at that time that land had been located in my name, contracts had been made concerning the same [310—204] and that I was interested in the lands. No, I had not myself conveyed any interest in these locations to anybody else. Yes, when Searls gave me this $250 for the check he gave me some reason, but exactly what it was I don't remember. It had something to do with oil lands. Suppose I read the matter appearing above my signature in receipt for this $250. Searls gave me some reason for that writing, but I don't remember now what it was. Yes, remember Searls wrote me something about others trying to enter the property and a necessity for keeping jumpers off, but I didn't exactly know what was meant by the term jumpers.

Q. Now, I refer you to the paper, dated the 12th day of August, 1913 * * *

(Contents of Plaintiff's Exhibit 15 recited.) A.

(Deposition of George W. Berry.)

I must have signed it, but I really do not remember that paper.

This certificate No. 32 for 1000 shares of stock in the Pacific Oil Lands Company, my receipt for which is dated September 18, 1911, was received from Searls in person, to whom the receipt was given.

Q. And Mr. Searls, when he gave you that stock, did he tell you what had become of your interest in the contract which you ratified, or what had become of your interest in the locator's lands for yourself? Didn't he tell you that it had all been put into this corporation so as to handle it better? A. No.

I am sure of that. No, he didn't tell me that each of the thirty-two locators was receiving 1000 shares of stock. He then said the stock was valuable but not how valuable, or how much it is worth per share nor did I ask him. He said it was valuable and that I should take it for granted that it was. No, I don't know how many shares of stock the company has or [311—205] what percentage of the total number of authorized shares of capital stock 1,000 shares is, or was. I probably did question that at, one time, but I don't know what the answer was. Did not ask at that time how many shares of capital stock the company had issued. Don't remember the gist of conversation at that time. I know I never met him but what we didn't have an hour's conversation. In fact, he would go over the affairs of these different companies and I got more or less muddled with him, so many names one was as much like the other as two peas, and of course I didn't understand it in a busi-

(Deposition of George W. Berry.)

ness way. Nothing was said at that time about the fact that the Government had withdrawn the land and that if the Government succeeded in recovering the lands the company would not have anything at all. But I know that I did receive from Searls letters to the effect that there was some trouble with the Government. But whether it was previous to that or not, that I cannot answer. Think I got this Columbus Midway stock after I surrendered the Pacific Oil Lands Company stock to Searls. No, Mr. Searls did not tell me at the time I returned this 1,000 shares of Pacific Oil Lands Company stock brought to me, and received the $9250, that I could take my choice of "either selling this stock for $250, or holding onto it and take a chance on what its value would be; that the Government was trying to recover these lands, trying to recover upon the contracts owned by the Pacific Oil Lands Company, and if the Government won, the stock would not be worth anything at all?" He told me nothing about that. He asked me if I would take $250 for it, and I told him yes. Yes, I read that report of the Pacific Oil Lands Company of January, 1914, but naturally forget what the import of it is.

Q. And you did have some information as to the acreage of [312—206] twenty-eight hundred acres contained in this report? A. Yes, sir. Q. And you did have some information as to what was done with the land in order to work it up, didn't you? A. Yes, sir. Yes, I was advised, whatever there was in the report at the time I read it. Don't know that I

(Deposition of George W. Berry.)

knew that trouble with the Government existed at the time I surrendered this stock to Searls for $250. That was not the reason that I took $250 without debating the matter. I had left everything to Searls and McMurtry. Mr. Searls was my friend, and I considered that he would look after my interests and I considered Mr. McMurtry was a man of honor and I respected him myself. Had no reason for thinking that McMurtry would take the interest which I had in the located oil lands, and I never knowingly gave him permission to do it. At the time Searls offered me $250, for the stock did not advise with him as to whether it would be a good thing to keep it or let them go at that price. Am sure about that. Considered that I had a right to sell it at any price I chose.

Q. Now, didn't you know as a matter of fact, after reading that report, that those 1,000 shares of stock in this company were given to you, and represented your interest in those located lands? A. In the located lands of that Pacific Oil Lands Company? Q. Yes, exactly. A. But, as I understand, there are several locations which I did not seem to know anything about. The other one, of course, when I held those shares, I was holding a certain amount in that particular locality. No, I did not think this 1,000 shares was given to me as part payment of the note or interest on the note that McMurtry owed me. The Columbus Oil Lands Company was.

Q. Is it a fact that when you are reported as saying in reference to the interest on your note, "Mack's

(Deposition of George W. Berry.)

property'' that [313—207] you were referring to the Columbus Midway property and stock, and not to the property or stock of the Pacific Oil Lands Company, referred to in the report from which I have just interrogated you, as a locators' property? A. That may be possible, because there are different names, and there are three different companies there, and all more or less all muddled up to me, and it is possible it may have been mixed a little. Q. You didn't think that the property you located, and those thirty-two other people located, belonged to McMurtry, did you? A. No, I did not. I didn't know the standing, that is, my exact relationship to these Columbus Oil properties. Q. And it was, in fact, the Columbus— A. I don't mean the Columbus. I mean the Pacific Oil Lands Company. Q. You mean at the time you testified? A. Yes, sir, when I made that statement. I am learning more in this matter all along the line. Q. You did not mean to infer then or now, do you, that the properties which you located or any interest therein, belonged to Mr. McMurtry, do you? A. No, no, no. No, I did not mean to infer that the other seven locators with me had located for or on behalf of McMurtry. I understood that he was not in it; that he was in some other property that I didn't know the name of. Am not acquainted with H. M. Walker, H. E. Bashore, W. F. Christman, or Pentz or Mahr. There are three persons in this company, or in this matter that I have had an acquaintance with, and that is Mr. Searls, Mr. McMurtry and

(Deposition of George W. Berry.)

Mr. Thorn. May possibly have met others but these three are the only ones I have personal acquaintance with, and what information I had came from them. I turned the matter over into Mr. McMurtry's hands when I gave him that power of attorney, and I left it to his knowledge to do what he thought was best concerning it. I knew nothing about oil. [314—208]

Q. You mean for you? A. For me.

Certainly I would not have signed that power of attorney of December 1907, if I had known that by executing it, it would become an instrument in the hands of anyone to unlawfully acquire the right of possession to the public domain.

Now, I have my bank-book with me and find that I deposited $1,000 on December 29, 1910, on McMurtry's notes to me. I have here a memorandum, which I think correct, in which I say I received on December 28, 1910, $1,000 on account, and there being still due me $2,340.31. Then on September 18, 1911, I recieved $1,500. That memorandum was made after I sold the Pacific Oil Land stock for $250. I know because there is a memorandum of that transaction. My bank-book shows that I deposited this $1,500 on September 21, 1911.

Mr. ACH.—In response to my question the gentleman produces a certificate of 4,000 shares of the Columbus Midway Oil Company, No. 441, issued to George W. Berry for 4,000 shares, bearing date the 26th day of September, 1911, signed Douglas S. Watson, President, L. H. Jacobs, Secretary; the cer-

(Deposition of George W. Berry.)

tificate announcing that this is a corporation organized under the laws of the State of California, incorporated June 18, 1910, capital stock $1,000,000, one million shares.

Q. Now, that your deposit book is here, which shows that a deposit was made on December 21, 1911, of $1,500, I present you your receipt for the certificate of stock, certificate No. 32, a thousand shares of the Pacific Oil Lands Company, dated December 18, 1911. Do you now remember if you had that Pacific Oil Lands Company stock in your possession at the time you were [315—209] paid the $1,500, or whether you got the $1,500 before you got the stock? A. Before I got the Pacific Oil Lands Company stock? Q. Yes, sir, whether it was before or after, do you remember now? A. You are speaking now of whether I had that fifteen hundred previous? Q. Before or after you signed that receipt for that stock? A. If I remember right, it must have been afterwards the sum of $1,500, as that amount was the last one I received.

Think I received this Columbus Midway stock after I received the last payment on the note. I think it was later because I think from a letter I have here—

Q. Have you a letter here in reference to that? A. Well, it is merely a personal letter from Mr. Searls. I think it speaks of that stock.

Mr. ACH.—The letter reads as follows: It is on the letter-head of William Baumgarten & Company,

(Deposition of George W. Berry.)

323 Fifth Avenue, New York, and dated New York, September 23d, 1911:

"Dear Berry:

"Just a reminder for you, when you get home and think of it, please sent me that old 'Empire' stock so that I can get it out of the way. Mack left Wednesday for home with everything in excellent condition, so now we all look for *results.* A year or two will mean MUCH. Your other stock is ordered and ought to be here in another week or so, when I will see that you get it. Also I will try and see Pratt tomorrow, and see what he has to say"—

The WITNESS.—That is in reference to another matter. Q. (Continuing reading:) "Put that check in in time now, if not already in. Sincerely yours, F. H. Searls."

Yes, this letter refreshes my memory as to the fact that I and Searls had a meeting shortly prior to the date of the letter. This reference to stock must have the Columbus [316—210] Midway stock.

(Witness produces a letter which is marked Joint Exhibit No. 1 which he states he received from L. B. McMurtry, San Francisco, in the course of the mails.)

Mr. ACH.—The letter which you hand me is dated May 15, 1910, after being addressed to you as "My dear Mr. Berry," states as follows:

> "We expect any day now to be able to pay off all of the old accounts, and take up all stock sold, with interest. Secretary Ballanger is making some trouble for us. If it had not been

for him, you would have had your money before this. You were sure of getting it within two or three months."

* * * Is it not a fact that that referred to the Empire stock which you held at that time as security? In other words, isn't it a fact that you did not have any other stock in any other oil company with which Mr. McMurtry was connected on that date? A. Why, it must have been Empire stock, but what that refers to mostly is to the matter of those notes in which I was most interested. Q. * * * That was in response to your demand for the payment of the McMurtry notes? A. That was what it was. Q. Have you any other letters from Mr. Searls? A. (Witness produces letter.) Q. In answer to my question you produce letter dated May 21, 1910, signed Searls. A. Yes. (It is marked Joint Exhibit 2 and reads as follows:)

"Your note received. I have tried to get down to see you, but this is such a slave position and you so far away, I can't make it. I called you on the phone this afternoon, but no answer, closed, I guess. I had a letter from Mack this morning. He says a couple more [317—211] months, maybe sooner, will fix things up with him, and he can clean the slate, and my advice to you is to try to be patient a little longer. I know it is hard, but I am so sure of the outcome that I can't help but advise you to rest on your oars. Things will surely come our way, so sit tight and saw wood."

(Deposition of George W. Berry.)

Q. I see this communication is dated at the top, "323 Fifth Avenue." That is where this gentleman was working at that time? A. Yes, New York City. Q. Then he winds up in this letter, "Regards to Mrs. B. Mack's address is 1325 Green Street, S. F., Calif." A. Yes. Q. Have you any other letters from McMurtry or Searls? A. No, not that I can find.

Redirect Examination.

Q. I invite your attention now to letter marked Joint Exhibit No. 2. How did Mr. Searls come, if you know, to write that letter to you? A. Why, I asked him about the payment of the note, or notes, whichever they were at that time, and that was his answer. I asked him also if I could not write to McMurtry, and that was what he gave me his address for at the bottom of the letter. Q. Did you afterward write to McMurtry for the notes? A. I did. Q. Is the letter which was marked Joint Exhibit No. 1 the answer which you received from McMurtry? A. I believe it was. I had received two letters from McMurtry. That is all I ever received. I do not think, I do not know what is contained in the other one, and whether this is the answer or the other, I do not know. I think this is the first one, though.

Recross-examination.

Q. Well, this is the fact, isn't it, that you received from McMurtry, directly or indirectly, $1,000 in money or check, December 28, 1910, and $1,500 Sep-

(Deposition of George W. Berry.)

tember 18, 1911, and the Columbus Midway stock in payment of that debt against McMurtry? A. Yes. [318—212]

Q. And that afterwards in connection with this transaction you received $250 for the sale of the Pacific Oil Lands Company stock; isn't that correct? A. Yes. [319—213]

**Deposition of Julius W. Pentz, for Plaintiff.**

JULIUS W. PENTZ, called April 20, 1917, on behalf of the plaintiff, testified by deposition as follows:

Am a publisher and reside at Hempstead, Long Island. Resided in New York City in December, 1907, and was a publisher at 299 Broadway. Never lived in California. Was not acquainted with L. B. McMurtry in December, 1907, and don't remember knowing F. H. Searls and J. B. Thickens; knew C. W. Thorn.

Q. The records of Kern County disclose that J. W. Pentz and others appeared on December 18, 1907, before Samuel C. Worthen (substance of Plaintiff's Exhibit 7). Are you the J. W. Pentz who executed that instrument? A. I think I am; yes, sir. I remember that Mr. Thorn came into my office and said that there were a number of other men who were willing to stake out some mining claim or oil land claims, rather, in California, and that by getting my signature the thing might develop into something valuable for me. That is as far as I can remember. Was not then or now familiar

(Deposition of Julius W. Pentz.)

with the mining laws of the United States; probably had a vague idea of what rights a citizen might have under the circumstances. Had the idea that if I and other parties became interested in any oil lands or mining claims of any kind, that the Government would protect our rights against fraud or infringing upon our rights. Had had no business relations with Thorn prior to that time. He was connected with the Empire Oil Company, located on the same floor in the Barclay Building, No. 299 Broadway, and was in our office and had seen him, in our office, perhaps all during that time and we were there about six years in that building. Think I signed the power of attorney in my office at the time he first mentioned it to me. [320—214] Think a Daniel W. Darling, who had a desk in our office, was present and think he was the man who introduced me to Thorn. Don't remember that Darling signed the power of attorney in my presence. Don't remember S. H. Freeman, J. F. Harder, F. H. Searls or Frank D. Taylor. Think I recall seeing Powell afterward with Darling and Thorn. Don't remember the next paper I signed in this connection. Think I signed others, but don't remember the nature of them.

(Plaintiff's Exhibit 17, being a photographic copy of the ratification, shown witness.)

That looks like my writing, it must have been brought into our office by Thorn. Don't remember what he said. Don't remember even the substance of what he said. I must have read it before signing

(Deposition of Julius W. Pentz.)

it. Don't remember that I made any inquiries of Thorn as to why he wanted me to sign it. Did not then know how many locations had been placed upon public lands in California under my name. Made no inquiry as to the number of claims or as to the value of any lands located by the use of my name. Darling died subsequent to May, 1913, cannot say just when. Don't recall when I next heard anything about these oil land transactions, but I know I received some shares of stock from Mr. Thorn.

Q. I invite your attention now, Mr. Pentz, to a check which is, in substance, as follows: Check No. 160. New York, September 11, 1911. Second National Bank of the City of New York. Pay to the order of H. W. Pentz, two hundred and fifty dollars. ($250.00.) (Signed) F. H. Searls. And on the reverse side thereof is the following in typewriting:

> "Received from L. B. McMurtry, $250.00 in full payment for all my right, title and interest in and to all lands located by said L. B. McMurtry, on my behalf, in Kern [321—215] County, California, pursuant to a power of attorney made by myself and others to said L. B. McMurtry, bearing date the 18th day of December, 1907."

And right underneath that typewriting which I have read to you is your signature, "J. W. Pentz." And written just below that is the name of C. W. Thorn and F. H. Searls. Is that your signature

(Deposition of Julius W. Pentz.)

to that typewriting, or just underneath that typewriting (showing witness)? A. Yes, sir. Q. On the back of this check? A. Yes, sir. Q. Do you remember when you received that check? A. No, sir. Q. Look at the date of it and see if that refreshes your memory any (showing witness)? A. This may have been given to me at the time Mr. Thorn gave me the shares of stock, but I am not sure about it now. Q. Who gave you this check? A. Mr. Thorn, I think. Q. What did you do with the check after you had endorsed your name, J. W. Pentz, on the back of it? A. Mr. Thorn took it, and I think he gave me some stock for it, or did something with it.

Received no cash by reason or endorsing that check. The stock certificate that I received was one for 1,000 shares in the Pacific Oil Lands Company, and the other one was for 750 shares, I think, in the Columbus Midway, or some such name as that. I had a sort of mixed up idea of the whole affair—I don't know how to express it—but it seemed to me that the shares were given to me because I had, through Mr. McMurtry, staked out some oil lands in certain places along there, and it seemed to give them, it seemed to help them to stake out more oil lands, or continue with the business, or something of the kind. Certificate No. 21 of the Pacific Oil Lands Company looks like the one that Thorn gave me at that time. The receipt attached thereto, dated September 16, 1911, bears my signature. [322—216] Don't remember signing it. It was probably

(Deposition of Julius W. Pentz.)

presented at the time the certificate was given to me. The next I recall in this matter was two Secret Service men came into my office in the Woolworth Building. It may have been in October, 1913. I heard their names but don't remember them. They showed me their badges. The next I recall in this oil land transaction Mr. Thorn came in, but how soon after, I don't remember, and he said to me, "Do you remember the time when I gave you two certificates of stock?" And I said, "Yes," and he said, "Well," he said to me, "at the time when you received those you promised to sell those back to us for $500," and as he said so, he pulled out five one-hundred dollars bills and as he did so he said, "Here is your money. Would you mind getting your stock?" And I said, "Must I do it now? I am too busy to bother now, but rather than to get into a fight about it, I will get you the certificate of stock," and I secured the certificates from the deposit box and handed him the stock and he gave me the money."

Q. Do you remember on the other visit that you promised to surrender it for $500 to Mr. Thorn? A. Absolutely not.

(Witness identifies signature on Plaintiff's Exhibit 18.)

That must have been presented to me by Thorn. Don't remember the conversation at the time. I signed it for the same reason I signed the other papers. The oil lands had been staked out and also I had my doubts about it and being somewhat of a

(Deposition of Julius W. Pentz.)

gambler, I thought the thing might turn out all right after a while.

(Identifies signature on Government's Exhibit 19.)

(Plaintiff's Exhibit 17 read in evidence with the deposition and is as follows:) [323—217]

(This is a ratification similar in form to Plaintiff's Exhibit 1 with the deposition of Frank B. Chapman and purports to have been executed by J. W. Pentz, August 16, 1910.) [324—218]

(Plaintiff's Exhibit 18 with this deposition is a proxy similar in form to Plaintiff's Exhibit 5 with the deposition of Frank B. Chapman, and purports to have been executed by J. W. Pentz, August 12, 1913.) [325—219]

(Plaintiff's Exhibit 19 with this deposition is a consent to dividends similar in form to Plaintiff's Exhibit 6 with the deposition of Frank B. Chapman, and purports to have been signed by J. W. Pentz, December 9, 1913.) [326—220]

Q. I now invite your attention to a check, in substance as follows:

> "San Francisco, 1/8/1914. No. 1187. The Bank of California National Association, San Francisco. Pay to the order of J. W. Pentz, $20.00."

That check is signed, "Pacific Oil Lands Co., by F. E. Harrison, Secretary and Treasurer."

It is also signed, "L. B. McMurtry, Vice-President." Endorsed on the back thereof in a rubber stamp is the following:

(Deposition of Julius W. Pentz.)

"Pay to the order of The National Nassau Bank of New York." And right underneath that rubber stamp is the name, "J. W. Pentz."

That is my signature on the back of that check. Received it from California by mail and deposited it in my bank to my own credit. After surrendering this certificate No. 21 to Thorn and receiving $500, received no other money, on account of the fact that I held said certificate No. 21 on account of any of these oil transactions. When I surrendered this certificate I did not know nor had I been informed how many times my name had been placed on oil land locations in California, or what rights in oil lands had been located in that State by McMurtry acting under the power of attorney which I signed in December, 1907, nor had I any knowledge whatever of the assets or resources of the Pacific Oil Lands Company, nor did I have any knowledge with respect to the transactions concerning these oil land matters that had been carried on by Mr. McMurtry acting under this power of attorney. As far as I can remember. Well, I tell you at the time this was surrendered, I was very much engrossed in my own business and looked upon this as a sort of a side issue, and I paid very little attention to what transpired in this transaction. No, since the surrendering [327—221] of that certificate I have not claimed any interest in the lands that were located under this power of attorney.

Q. Do you claim any interest in any such lands? A. Why, I suppose I have a right to. Think this

(Deposition of Julius W. Pentz.)

certificate showed the capital stock of the company. I don't remember the exact amount. Do not know who the other stockholders were when I surrendered the certificate. Never made any inquiry to ascertain the number of locations on which my name appeared or the value or extent of any oil lands in California upon which my name appeared as a locator that I remember. Never was called upon for money in the development of these oil lands, nor did I know at the time I surrendered this certificate the state of the development of the lands. Did not remember whether any representations were made at the time I signed the power of attorney as to what expenses I would be compelled to bear, if any, in the development of any oil land that might be located. Never knew McMurtry personally.

Q. I now invite your attention to a paper, or three sheets of typewritten matter, which are headed, "Pacific Oil Lands Company. First Report to Stockholders." In the upper right-hand corner, in pencil, is "Jan. 1914," and in the upper left-hand corner the initials, "H. A." and "F. H." Please examine that. A. I do not remember ever having seen this. Q. Have you ever been interviewed by any special agents of the Government in this matter? A. Yes, I reported this, that two men came into my office in the Woolworth Building. Q. Have you ever had any conferences, recently, with Mr. C. W. Thorn in regard to these matters? A. No, sir—yes, Mr. Thorn was in my office with Mr. Brann,—

(Deposition of Julius W. Pentz.)

They were in my office on Saturday morning. [328—222]

Q. I mean during the year 1916, did you have any conferences with Mr. Thorn? A. I think Mr. Thorn was in my office last—it may have been the middle of the year in 1916; suggesting that,— Q. Did he say anything to you at that time about these oil matters, these oil lands? A. He asked me if I could not spare the time to go down there and live on those lands.

Mr. ACH.—Live on them?

The WITNESS.—He said live on them, whatever it was—I don't remember now.

Q. To what lands do you refer? A. These oil lands.

Cross-examination.

Have been in the publishing business about 14 years. Now publish the "Hardware Review." It is a corporation. I have the controlling interests. In December, 1907, I was on the thirteenth floor of the Barclay Building, 299 Broadway. The Empire Oil Company office, if I remember rightly, was on the same floor. Don't remember ever knowing F. H. Harder, S. H. Freeman or F. H. Searls. In 1907, my salary was seventy-five dollars a week. Think it was the same in September, 1911. In September, 1914, it was one hundred dollars a week. Before becoming interested in the publishing business was a stenographer and clerk, law and commercial. Was in a law office about two years, in which time I prepared papers. I knew the purpose and

(Deposition of Julius W. Pentz.)

effect of an acknowledgment before a notary public. Yes, my experience was such that I always read over a paper before I signed it. The money I invested in the publishing business was money I had saved from my earnings. Did not always rely entirely upon my own judgment in signing papers. In this transaction I relied on what Mr. Thorn told us about this matter. Had confidence in him, in a way I did. [329—223] Had no business transaction with him before signing this power of attorney. Mr. Darling had a desk in our office. He and Mr. Elliott were very friendly with him and once in awhile Thorn would come in and talk with Darling and Elliott, and when this first power of attorney was presented, and the other fellows thinking it was all right, why I merely read the thing over and signed it. Oh, yes, I knew it was the power of attorney. Talked it over casually with Darling and Elliott, but don't suppose I made any special effort. They thought it might be a good thing to own some oil land and this was done for that purpose. To tell you the truth, my feelings were rather mixed in the matter. I had my doubts because of the Empire Oil Company going out of business, and this company being organized to stake out more lands, and I had my doubts whether the thing might prove profitable. Nevertheless, I signed it, being a gambler, somewhat. Yes, it was my intention in signing the power of attorney, to acquire and own some of those oil lands, but I still had doubts in my mind. Never talked with Mr. McMurtry about the matter at all.

(Deposition of Julius W. Pentz.)

The only persons that I talked with were Darling, Elliott, and Thorn. Darling was acquainted with McMurtry, he said, before signing the power of attorney. Don't remember what he said concerning Mr. McMurtry. Yes, he said that he had been advised that Mr. McMurtry was going out to California to try and find some Government land that could be located for oil. Don't remember that he said he got this information from Thorn or McMurtry. No one ever asked me to sign any agreement to the effect that whatever lands were located in my name in California would belong to anybody else. Don't remember that Darling said that he had agreed that any lands located in his name would be given in whole or in part [330—224] to anyone else. Yes, I knew at the time of signing this power of attorney that a citizen of the United States, under the laws, had a right to locate mining lands that belonged to the Government. Was not advised before signing this power of attorney that McMurtry had a large experience in the oil business and was acquainted with Government lands in California. Don't remember that anyone ever said that his name was put in because he was supposed to go out to California, and stake out the lands, that he had some knowledge of the oil business and the prospects out there was implied. At the time I signed the power of attorney no one promised to pay me any money for it, or give me anything for my signature to the power of attorney. The only promise

(Deposition of Julius W. Pentz.)

was made by Mr. Thorn that the thing might turn out to be valuable.

The letter which came with the check for $20.00 is the only other letter I recall receiving from the Pacific Oil Lands Company. After signing this power of attorney at the request of Thorn he gave me another paper to sign. Don't know whether it was a power of attorney or not. Never communicated with McMurtry or wrote any letters to Thorn. I understand the language of the power of attorney as read and I read it at the time I signed it. Yes, understood that it gave McMurtry right not only to locate mining claims and improve the same, but also to sell or mortgage all the same or part thereof, and that this specifically applied to oil lands in California. Don't remember ever signing any paper modifying or repudiating the power of attorney. If I could see any document to that effect, I might refresh my memory, but offhand, I don't know. There may have been one. The special agent of the land office interviewed me, it may have been about 1913 or 1914. [331—225] Don't remember how long before that it was that I had seen Thorn. Had not had any reports from the Pacific Oil Lands Company, Thorn, Darling or Elliott, of and concerning what McMurtry had done in California under the power or attorney. Don't recall having had any report at all of the transaction. Don't remember that Thorn had told me that McMurtry had acted in the matter prior to the visit of the special agents. The only thing I recall having received be-

(Deposition of Julius W. Pentz.)

fore that was the $20.00 dividend check. Yes, I held the stock then and knew it came to me as the result of my connection with McMurtry, but no one had told me that McMurtry had located lands and caused them to be transferred to the Pacific Oil Lands Company. No one had told me that. Thorn gave me the stock. Don't remember just what he said. I certainly was acting in good faith without intent to injure anybody when I received that check and receipted for the stock. Was acting in good faith when I signed the ratification (Government's Exhibit 17). I read that at the time I signed it and understood it before acknowledging.

Q. This ratification also contains this statement by you: "Signed, sealed and acknowledged"—after you read it and understood it—"I do hereby ratify, approve and confirm those certain contracts of sale made for me and in my name with L. B. McMurtry, as my said attorney in fact."

Now, Mr. Pentz, you knew at that time that it was represented to you that some way or some how, by somebody, and by this instrument that you were asked to sign, that McMurtry had acted upon the powers of attorney, and had recorded them, and for you, and in your name, and as your attorney in fact, made contracts of sale, and that you were ratifying and approving those contracts by putting your name there, didn't you? [332—226] A. Well, Mr. Thorn, he evidently must have presented this thing to me for signature, and he might have told me at the time what thing was for. Of course, I was en-

(Deposition of Julius W. Pentz.)

grossed in my own business, and I don't suppose I paid very much attention to that, feeling that this instrument was a part of what had already been done, and simply a sort of a link in the chain of acquiring the oil lands, or whatever they were after.

Mr. ACH.—I move to strike the answer out as not responsive to the question. Please read the question to the witness again, and I will ask the witness to please give me a direct answer.

(Question read to the witness.)

A. Well, I don't know how to answer that, for the reason that I may have been, I was, then, very much engrossed in my own business, and this may have been presented by Mr. Thorn, and I signed it, and he may have made some explanation as to the reason why it should be signed, and so forth. Q. But you saw, Mr. Pentz, as a man of affairs, with the experience you have had, that you were ratifying, by your signature, mining contracts made in your behalf by your attorney in fact, Mr. McMurtry, for the sale of something? A. Yes, I don't deny that. Q. You would not have done that unless you had some information on it, would you? A. I don't know how to answer the question for the reason that this paper may have been presented by Mr. Thorn, as the others were, and believing that they were engaged in staking out oil lands, I presume I signed it, and paid no further attention to it. Q. You believed at that time that Mr. McMurtry and Mr. Thorn were taking care of your interests in the matter, and you were ratifying the acts that they

(Deposition of Julius W. Pentz.)

were doing on your behalf. A. Yes. Yes, in signing the ratification I must have known that these people were asking me to ratify something that McMurtry [333—227] had done in California. I don't remember what passed between the special agent and myself or whether McMurtry's name was mentioned. Recall only four interviews with Thorn in this matter. The first time when I signed the power of attorney, the second time a year or two later, I think when he asked me to sign this ratification, or whatever you call it. I saw Thorn occasionally on the floor there in the meantime, but nothing was said about this matter that I recall. While I was in possession of the Pacific Oil Land Company stock I remember reading something about the Southern Pacific being in trouble about having some trouble about having some of these lands, and the Government trying to reclaim or get them away from them—something to that effect. I don't know whether it was on mine or not.

Q. But, as to this land, didn't Mr. Thorn say to you at any time, in your talks with him on the subject, that the Government had withdrawn these lands, and was about to commence suit to recover these lands? A. He was in my office at the Woolworth Building, at one time, and he asked me, if I remember rightly, whether I would be willing to live on these lands in order to verify the claims, but when that was, I don't remember, though.

He simply said would I be willing to go out there and live on the land, that he expected to get some

(Deposition of Julius W. Pentz.)

others to go, and would like to have me join the crowd, and live on the land. Don't remember exactly when this was. I suppose the lands he referred to were oil lands, though he did not say anything about that or how far they were from San Francisco. He said they were in Kern County, that is all we knew. I did not accept the proposition and he did not go into details. Don't remember the circumstances under which I received the stock in the Columbus Midway Oil Company. It was one certificate for 750 shares, I think. [334—228] Gave it back to Thorn from whom I received it as well as the certificate of stock in the Pacific Oil Lands Company. Thorn never gave me any money nor promised me any while he said this thing might turn out to be very valuable referring to the stock. Yes, when he gave me the stock he said something about it representing my interest in the lands located and in the contracts that I had ratified, and that he thought it might turn out to be very valuable.

Q. Now, you seem to have forgotten, notwithstanding the fact that you were interrogated about it by my friend Mr. Hall, that on or about September 11, 1911, you endorsed this check for $250, payable to your order, and signed by F. H. Searls. If you will kindly turn it over, the endorsement is upon the back. Now, isn't it true that at the time you got this certificate of stock of the Pacific Oil Lands Company, that Mr. Thorn also gave you or presented to you that check of $250, and told you that

(Deposition of Julius W. Pentz.)

that was a part of the money which the locators and each and all of them were receiving, realized out of those contracts, and that he had some Columbus Midway stock, and that he could give you 750 shares of that stock for $250, and advised you to buy it, and he said he thought you would make a sum of money out of it,—isn't that true? A. That may have been the way in which I secured the Columbus Midway stock. Q. Isn't that true? A. It may have been. Q. Don't you kind of remember it that way, now that I put it to you? A. Yes. Q. Now, is it not true also that at that time he told you that in addition to the $250, that all these lands and contracts, or something like that, had been put into a corporation by Mr. McMurtry, as your agent, in order to better handle the matter and that therefore they desired that you should sign that transfer over to McMurtry, who had already [335—229] formed this thing into the Pacific Oil Lands Company, as your agent, and taken the stock, isn't that true? A. It may have been true. Q. Don't you remember it now, or something to that effect? A. Well, that probably was the method of procedure, but I can't now swear it was. Q. I am not asking you to swear to it as the method of procedure. I am asking you now whether there is not an impression come into your mind that that, or something to that effect, was said by Mr. Thorn to you at that time? A. I suppose there was. Q. Does not the mere asking of the question suggest to your mind that there was something of that kind said to you by Mr.

(Deposition of Julius W. Pentz.)

Thorn at that time? A. Yes. * * * Q. You heard Mr. Hall state that it was in August, 1913, that this interview is said to have occurred, and you just said that it may have been as long as two years after you moved into the Woolworth Building. You are not very good in your memory as to happenings and facts, are you, Mr. Pentz? A. No, sir, not in this business. Q. What? A. Not in this affair. Q. Now, the next question will be: Can you remember what took Mr. Thorn into your office,—I mean, of course, what business took him in your new offices in the Woolworth Building. Do you understand the question? A. Yes, I understand the question. I think it was about these oil lands, about proving my claim, and about living out there, as I said before. That may have been it, but I do not recollect now. Q. The fact of the matter is that he talked so much about oil lands, and different things in connection with these oil lands, at the various times that he came to see you, that you as a matter of fact did not pay much attention to what he told you? A. No, sir, I was engrossed with my own business. Q. That is true, that you did not pay much attention to what he told you about it? A. Yes. Q. Just a little [336—230] impression that you got now and then? A. Yes. Q. Well, you took the results, whatever they might be, such things that were coming to you by reason of the location of these oil lands, or whatever was located, by Mr. McMurtry? A. Yes. Q. And you did not think that Mr. McMurtry or Mr. Thorn or anyone connected

(Deposition of Julius W. Pentz.)

with the location of these lands, had deprived you of a single thing that was coming to you by reason of your having located these lands through Mr. McMurtry? A. No, sir. Yes, I read Plaintiff's Exhibit 18 before signing and knew what it was. Thorn asked me to sign that. He didn't say much of anything except that he asked for my signature to appoint Mr. McMurtry my proxy. He did not explain, to the best of my recollection. Yes, I received Government's Exhibit 19 through the mail from San Francisco, with request that I sign it, and that there would be a dividend coming to me as a stockholder in the Pacific Oil Lands Company. Yes, this check No. 1187, dated January 8, 1914, for $20.00 bears my endorsement.

Q. Now, I show you a letter marked Defendant's Exhibit "D," being a letter written on the letterhead of the Pacific Oil Lands Company, dated January 8th, 1914, reading as follows:

"Dear Sir:

Enclosed you will please find dividend check for $20.00, same representing your *pro rata* of the first distribution to the stockholders of the company of cash assets amounting to $20,000, and to which distribution we hold your written consent.

Accompanying this letter you will also find a statement covering the affairs of the company. This also, we feel sure, will prove of great interest to every stockholder.

(Deposition of Julius W. Pentz.)

Wishing you a very happy and prosperous 1914, [337—231] we beg to remain,

Very truly yours,
PACIFIC OIL LANDS COMPANY,
By F. E. HARRISON,
Secretary."

Didn't you receive a letter identical with that, with your $20.00 check? A. I think I did. Q. And is it not equally true that enclosed in that letter with that check, there was a copy of the statement marked with the initials H. A., and the initials F. H., dated January 1914, Pacific Oil Lands Company, First Report to Stockholders. Isn't it true that that statement was included in that envelope and that you received it? A. I remember a statement was inclosed, but whether this was the one, I don't remember.

Yes, I read the statement. Presume I destroyed all the letters, reports, etc., in writing, which I received in this matter, as I have looked and been unable to find any. After I sold my stock I paid no attention to what had preceded that. When I sold this stock to Thorn he said to me, "You remember that when I gave you this stock, that you promised you would let me have it back for $500. Here is your money." That was in 1914. That is all I can remember, that he said,—he tried to recall to my mind the giving of the stock to me, the 1000 shares of the Midway Oil Company stock, and the other, and he said, "You remember promising me that if I wanted to buy this back, you would let me have it

(Deposition of Julius W. Pentz.)

for $500," or something to that effect.

Q. Wasn't that the Columbus Midway Oil Company stock that you bought for $250, and he told you at the time that he sold it to you for $250, and when he gave you that check, that if at any time you wanted to sell it back, and that if he wanted to take it back for $500, you would sell him that 750 shares of Columbus [338—232] Midway Company stock—isn't that true? A. No, sir, he took back both certificates. Q. No matter what he took, isn't what I told you true? A. I don't remember. Q. You will not dispute it, will you? A. I can't tell, because my memory fails me. Q. Did you advise with anybody else before concluding to take this $500 and giving him this stock? A. No, sir. Q. As you now remember, you mean that you never did make the promise to Mr. Thorn that you would ever sell the stock to him for $500. A. Absolutely not. Q. He did not deliver this stock in the Pacific Oil Lands Company, to you, the 1000 shares, upon the condition that you would sell it to him for $500 at any time, did he? A. No, sir. I gave him the stock and received $500 in cash in my office all at one interview; there had been no previous talk about it. I then had the stock in my office where I have kept it since having been interviewed by the Secret Service men. Did not mention to Thorn this interview by the Secret Service men. Thorn did not tell me what he was going to do with the stock or for whom he was buying it. I did not ask him. Did not ask him what had become of the contracts which had

(Deposition of Samuel R. Banks.)

been ratified in 1910, or what had become of the locations which had been made in my name nor did he tell me. [339—233]

**Deposition of Samuel R. Banks, for Plaintiff.**

SAMUEL R. BANKS, called on behalf of the plaintiff, February 20, 1919, testified by deposition as follows:

Reside at 531 West 159th Street, New York City. Am thirty years of age. At the present time I have concessions at the "Billy" Sunday Tabernacle. I have been a clerk in the office of Myers & Clark, an employee of the United States, and of the city of New York as a standardization salary expert. Resided at the same place in December, 1907. Think I was a salesman with the Pittsburg Reduction Company, at 99 John Street. Have known Frank R. Searls socially for about eleven years.

I am the Samuel R. Banks whose name appears as having signed that power of attorney (Plaintiff's Exhibit 5).

C. W. Thorn, whom I had known three or four years, talked about some act of the Government about these lands out there in California, and said something about it was in my jurisdiction, being of age, that I had the privilege of locating some of this land. I brought up the question as to whether I had to be a resident in California, or whether I had to know anything about the land in particular to make a location, to become a locator, and he said no. Yes, I knew L. B. McMurtry. Had met him

(Deposition of Samuel R. Banks.)

about a year before. Had had no business dealings with him or with any of the oil companies in which he was interested. Thorn advised me of my rights. (Other names on the power read.) Did not know any of those persons. Quite a while [340—234] later Thorn told me that they had started to sink a shaft, or well.

Q. Did you ever sign any papers after you signed this first paper we have been talking about? A. Yes. Q. When was that that you signed the next paper? A. When I gave the power of attorney to Mr. McMurtry. Q. I now invite your attention to a paper marked Government's Exhibit No. 21, purporting to have been signed on the 15th day of August, 1910, by Samuel R. Banks. This, I will explain to you, is merel ya photographic copy of the original paper. Do you recognize that as a photograph of your signature to the paper which you signed? A. I signed the paper.

I was called down town,—no, I received a letter, I think it was,—I am not positive about it,—and I am also not positive of whether Mr. Thorn or Mr. McMurtry was present at the time. I do know one of the two was. To the best of my recollection, I think it was at one of the hotels herein this city, that it was signed. I was asked, if I was willing to sign to Mr. McMurtry the power of attorney, that is the power of attorney to him, to put in force, or to enforce the location of lands out there,—something to that effect. I don't recollect just the conversation, but otherwise that if I would give my

(Deposition of Samuel R. Banks.)

power of attorney to him, he would do the work for me. Believe I read the paper at that time.

Q. You will observe that this paper reads as follows: "I do hereby ratify, approve and confirm those certain contracts of sale made for me in my name by L. B. McMurtry, as my said attorney in fact, with W. F. Herrin, et al., of date the 4th day of August, 1910. A. Yes. Q. Did you at that time learn anything about this contract dated August 4, 1910? A. Regarding [341—235] the land out there, you mean? Q. Yes, or no, I don't mean regarding the land, I mean regarding the contents of this contract dated August 4, 1910. A. I have a kind of hazy recollection that something was said about it. Q. Please tell me what was said? A. I don't know what particularly was said about it, but I do know there was something said regarding the properties or the lands.

(Plaintiff's Exhibit 21 with this deposition is a ratification similar in form to Plaintiff's Exhibit 1 with the deposition of Frank B. Chapman, and purports to have been executed by Samuel R. Banks, August 16th, 1910.) [342—236]